Supreme Court, U. S.
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IN THE

Supreme Court of the United States

October Term, 1976

NO. 76-1860

WESLEY WEST, ET AL,
Petitioners

v.

EXXON CORPORATION,
Respondent

PETITION FOR A WRIT OF CERTIORARI TO THE SUPREME COURT OF THE STATE OF TEXAS AND THE COURT OF CIVIL APPEALS FOR THE FIRST SUPREME JUDICIAL DISTRICT OF TEXAS

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The Petitioners are Wesley West and wife, Neva Watkins West, Betty West Stedman, a feme sole, James Wendell West, the Trustees for James Wendell West under the Will of James Marion West, deceased, to-wit: Wesley W. West, William R. Crain, Glenn C. House,

W. H. Hodges, and William E. Watson, Jr., and the Trustees for the Faith Foundation to-wit: Wesley West, Betty West Stedman, William E. Watson, Jr., (all of whom are collectively hereinafter referred to as "West").

The Petitioners pray that a Writ of Certiorari issue to review the opinion and judgment of the Supreme Court of Texas rendered in these proceedings on April 24, 1974, which remanded the cause for further proceedings; and to review the opinion and judgment of the Court of Civil Appeals for the First Supreme Judicial District rendered in these proceedings on October 7, 1976.

Nomenclature

Because of the voluminous record involved in this Appeal, it will be necessary to distinguish between the various documents. For this reason, the following abbreviations will be used throughout:

Statement of Facts from the First Trial=S.F. I

Statement of Facts from the Second Trial=S.F. II

The Stipulation introduced into evidence during the second trial will be referred to as "The Stipulation".

The Depositions of each of the various witnesses will be referred to as The Warnack Deposition and the Whitson Deposition respectively.

OPINIONS BELOW

On the first trial of the case, the opinion of the Court of Civil Appeals for the Tenth Supreme Judicial District is reported 496 S.W.2d 212 and appears as Appendix A, *infra,* pp. 1A - 1G. The opinion of the Texas Supreme Court is reported at 508 S.W.2d 812 and appears at Appendix B, *infra,* pp. 2A - 2N. The opinion of the Court of Civil Appeals for the First Supreme Judicial District rendered on appeal from the second trial of

the case, is officially reported at 543 S.W.2d 667 and, appears at Appendix C, *infra,* p. 3A - 3O. The Texas Supreme Court refused to review the Court of Civil Appeals opinion with the notation "no reversible error" on February 16, 1977 without a written opinion and denied Appellants' Motion For Re-Hearing on March 30, 1977 without written opinion.

JURISDICTION

The decision of the Texas Supreme Court, when handed down in 1974 was not a final judgment because the case was remanded for further proceedings. The judgment became final on March 30, 1977, when the Texas Supreme Court, by denying Petitioners' Motion For Re-Hearing of Petitioners' Application for Writ of Error, exercised it's discretion not to review the judgment of the intermediate State appellate court. Motion for Re-Hearing was timely filed and denied on March 30, 1977, pursuant to the Texas Rules of Civil Procedure. This Petition for Certiorari is filed within 90 days of March 30, 1977. The jurisdiction of this Court is invoked under 28 U.S.C. §1257 (3).

QUESTIONS PRESENTED FOR REVIEW

1. The Supreme Court of Texas, in its opinion attached hereto as Appendix "A" committed fundamental and reversible error through the taking of West's property without due process of law contrary to the Fifth and Fourteenth Amendments of the United States Constitution, and Article 1, §17 and 19 of the Texas Constitution. The Supreme Court, through its opinion, improperly and unconstitutionally exercised a power specifically re-

served to the Legislature of this State by delegating to Exxon the power of eminent domain and allowing Exxon to condemn the property of West for what the Court determined to be the "public interest".

Further, the Court and Exxon failed to follow the statutory guidelines set out by the Texas Legislature for such taking, thus constituting a further denial of West's right to due process. In addition, the fixing of a "fair market value" for the West property so taken was not done by an impartial tribunal as is required by Texas law, but rather the Court allowed Exxon to fix the price it would pay West for such illegal, arbitrary and capricious taking all in derogation of West's right to due process. The fundamental constitutional requirement that a guarantee of payment be made prior to taking possession was denied by the Texas Supreme Court. On the contrary, the Texas Court by its opinion allows Exxon, the de facto condemnor, to determine its own method of payment.

Each of the foregoing, singly, is a fundamental denial of due process by the Texas Court; however, the cumulative effect of all the above is such a rank denial of due process and such fundamental error as to shock the conscience of the ordinary person.

The facts of this case fall, of necessity, into one of two categories. This is either a trespass and confusion of goods case where the penalty for a wrongful confusion falls on the confusor; or, in the alternative, it is a condemnation case. The Court herein has ruled out the first alternative in specific language as follows:

> "As we have noted, it is our view that the acts of commingling native and extraneous gas did not impose upon Humble the obligation of paying royalties on all gas thereafter produced from the reservoir, if the evidence establishes with reasonable certainty the volume of gas reserves upon which the Wests would have been entitled to royalties, absent injection of extraneous gas." (Opinion of Supreme Court, Appendix B, page 14).

By impliedly relegating this case to the area of eminent domain, the Supreme Court has committed such fundamental error as set out specifically above, to merit the serious consideration of this Honorable Court, and the preservation of the ultimate constitutional rights of the property owner here involved.

2. The Court of Civil Appeals of Texas by its opinion attached hereto as Appendix "B", committed fundamental error by requiring the trier of fact to accept as true the opinion testimony of a witness, thus abdicating the basic function of the trial court to a partial, paid witness. The Supreme Court sanctioned such fundamental error by refusing Writ of Error herein. This fundamental error raises three zones or areas of constitutional inquiry:

(a) The combination of an extremely complex set of facts, a paid witness, and strict opinion testimony raises a serious risk of perjury. To require a Court to believe, accept, rely on and, most importantly, base a judgment solely on perjured testimony is fundamental error.

(b) Secondly, when the only question at issue is an opinion of value, the function of the determination of the credibility of the witness cannot be delegated to that very witness. By its opinion, the Court of Civil Appeals transforms a biased, prejudiced, partial witness into a decisionmaker. The most fundamental reason for the very creation of the American system of Courts is to in-

sure an unbiased decisionmaker for every litigant and it is fundamental error to emasculate the trial court in the manner done herein.

(c) In connection with both (a) and (b) above, the finder of fact in this case observed the demeanor of the witness, and heard his testimony not once but twice. He then found that he specifically did not believe the witness. The trial court found that the witness had been impeached with regard to his credibility so thoroughly that he was, in effect, unbelievable. It is fundamental error to require a court to base any judgment on such testimony.

Each of the foregoing, singly, is a fundamental denial of due process by the Texas Court and is reversible error, however, the cumulative effect of all of the above is such a rank denial of due process and such fundamental error to merit the serious consideration of this Court.

CONSTITUTIONAL PROVISIONS INVOLVED

Constitution of the United States, Amendment V, (U.S.C.A. Const. Amend. V, pg. 4):

"No person shall be . . . deprived of life, liberty or property, without due process of law; nor shall private property be taken for public use, without just compensation."

Constitution of the United States, Amendment XIV, §1, (U.S.C.A. Const. Amend. XIV §1, pg. 33):

". . . No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law;

nor deny to any person within it's jurisdiction the equal protection of the laws."

Texas Constitution, Article 1, Section 17 (Vernon's Constitution of Texas, Vol. 1, pg. 6):

"No person's property shall be taken, damaged or destroyed for or applied to public use without adequate compensation being made, unless by the consent of such person; and, when taken, except for the use of the State, such compensation shall be first made, or secured by a deposit of money; and no irrevocable or uncontrollable grant of special privileges or immunities, shall be made; but all privileges and franchises granted by the Legislature, or created under its authority shall be subject to the control thereof."

Texas Constitution, Article 1, Section 19 (Vernon's Constitution of Texas, Vol. 1, pg. 6):

"No citizen of this State shall be deprived of life, liberty, property, privileges or immunities, or in any manner disfranchised, except by the due course of the law of the land."

STATEMENT OF THE CASE

Preservation of error

The federal questions presented for the Court's review herein were first brought to the attention of an Appellate Court in Texas in Petitioner's Response to Application for Writ of Error filed before the Supreme Court of Texas. The fundamental error complained of herein and presented for this Court's review was first committed in the

opinion of the Supreme Court of Texas handed down on April 24, 1974. This opinion was so diametrically opposed to the law as it had previously existed in Texas that it came as a complete surprise to Petitioners herein and Petitioners preserved such fundamental error for review by immediately objecting thereto in their Motion for Re-Hearing which was timely filed with the Supreme Court. The Court denied rehearing without opinion on June 5, 1974.

The Houston Court of Civil Appeals again raised the question of Petitioner's denial of due process in its opinion handed down on October 7, 1976, and Petitioners again immediately brought the Federal questions complained of herein to the attention of that Court in their Motion for Rehearing to the Court of Civil Appeals which was timely filed. The Court of Civil Appeals denied rehearing without opinion on November 4, 1976. Petitioners brought forward these points again, in their Application for Writ of Error and Motion for Rehearing before the Supreme Court of Texas pursuant to their second appeal, both timely filed. Both Application for Writ of Error and Motion for Rehearing were denied without opinion by the Court on February 16, 1977 and March 30, 1977, respectively.

In accordance with the cases of *Urie v. Thompson*, 337 U.S. 163 (1949) and *Great Western Tele. Co. v. Burnham*, 162 U.S. 339 (1896), such error now complained of to this Honorable Court has been adequately and fully preserved for consideration. All briefs, motions, and other documents are voluminous and, therefore, pursuant to Rule 23 (1) (f) of this Court's Rules, will be included in an appendix to this Petition which shall be separately presented, along with the record, at a later time.

The following statements are found in the record at the places so indicated herein and demonstrate that the Federal questions here involved were timely and properly raised so as to give this Court jurisdiction to review this case on a Writ of Certiorari:

1. The following language is contained in West's reply to Exxon's Application for Writ of Error before the Texas Supreme Court, which was granted in 1974, the Court holding against West, and which opinion is attached hereto as Appendix "B":

> "What Defendant [Exxon] seeks here is in fact to condemn Plaintiff's royalty interest. Defendant does not enjoy the right of eminent domain but is attempting through use of its 'muscle' to do what it could do if it had such right. There is one difference. If Defendant had the right of eminent domain and sought to condemn Plaintiff's property interest to create a gas storage reservoir, the compensation to be paid Plaintiff would be fixed by an impartial tribunal. Here, however, Defendant, acting unilaterally, has fixed that compensation . . . Basically this case involves nothing more nor less than an effort by Defendant to appropriate Plaintiff's royalty interests and to justify such action upon the grounds of necessity . . ." (West Reply to Application for Writ of Error, page 28-29)

2. The following constituted a partial list of West's points of error presented to the Texas Supreme Court by Motion for Rehearing. Such Motion for Rehearing was denied without opinion by the Court:

> "7. This Court erred in destroying or impairing the contractual relationship between Respondents and

Petitioner, thereby depriving Respondents of due process of law in violation of the Fourteenth Amendment to the Constitution of the United States.

8. This Court erred in holding that Petitioner owns the lands in fee simple, which includes not only the surface and mineral estates but also the matrix of the underlying earth, that is, the reservoir storage space.

9. This Court erred in holding that Respondents did not challenge Petitioners ownership of the reservoir and its right to utilize it for storage.

12. This Court erred in holding that the public interest should be considered." (West Motion for Rehearing, Texas Supreme Court, page 2.)

3. The following language appears in the Motion of West for Rehearing before the First Court of Civil Appeals, Houston, Texas. Such Motion for Rehearing was denied without opinion on November 4, 1976:

"11. This Court erred in holding that the expert testimony . . . is uncontradicted either by direct testimony or by inferences to be drawn from the testimony presented.

14. This Court erred in holding the testimony of the witnesses, although interested, was corroborated and undisputed; in the absence of contrary evidence or inconsistency raising a reasonable suspicion as to its truth, it was conclusive of the issue.

18. This Court erred in ignoring the power and duty of the Trial Court to consider the credibility of Defendant's expert witnesses and to make findings of fact upon the basis of such consideration." (Motion for Rehearing of Appellees, First Court of Civil Appeals, Houston, pages 2-3.)

4. The following language appears in West's Application for Writ of Error before the Texas Supreme Court. Such Application was denied by the Court without opinion on February 16, 1977:

"The Court of Civil Appeals erred in holding that the Trial Court was *required* to accept the opinions and conclusions of Defendant's witnesses . . .

4. The Court of Civil Appeals erred in holding that the Trial Court was required to accept the veracity of the opinion testimony of Defendant's witnesses Warnack and Whitson despite the Trial Court's finding that he did not believe the testimony of such witnesses; and despite the further fact that at the second trial these witnesses flatly repudiated sworn testimony given by them at the first trial.

5. The Court of Civil Appeals erred in usurping the jurisdiction of the Trial Court to determine the credibility to be given the opinions and conclusions expressed by Defendant's witnesses Warnack and Whitson. (West Application for Writ of Error, Texas Supreme Court, page 5.)

5. The following language is found in Petitioner's Motion for Rehearing before the Texas Supreme Court. Such Motion for Rehearing was denied by the Court without opinion on March 30, 1977:

"8. The result achieved in this case denies West due process under the Fourteenth Amendment of the United States Constitution. The function of the trier of fact has been abdicated to the paid witness of a party, a witness who was not believed by the Trial Court and whose testimony was totally impeached." (West Motion for Rehearing, Texas Supreme Court, Page 14.)

Facts

At 7:00 a.m., December 28th, 1938, West conveyed to Exxon whatever rights and title under which Exxon claims today. Exxon did not receive all of the minerals because, at the time of the conveyance, West severed the realty into two (2) estates, a surface estate and a mineral estate, and retained part of the minerals in the following clear language:

> ". . . such royalties so excepted and retained are not herein conveyed and shall not be construed as passing to Humble Oil and Refining Company by any language whatsoever in this Deed contained . . ."

Insofar as gas is concerned, the royalties retained by the Wests are 1/6th.

As a substantial part of the consideration given to West for the conveyance, Exxon obligated itself, in clear unambiguous language, to produce, measure accurately and market the remaining native gas in the reservoir and to account to West for their royalty interest therein. However, prior to filling this obligation, *Exxon* determined that the reservoir was suited for use as a gas storage reservoir, and it was in Exxon's interest to so use the reservoir.

The use of the Clear Lake (Frio) Reservoir for storage of gas was authorized by the Texas Railroad Commission over West's objection, on January 20, 1970. The Commission made no determination of West's contractual or property rights nor the price to be paid to West nor was any determination made that Exxon could use the reservoir prior to producing the remaining native gas in the reservoir. No appeal was made from that order.

Instead, on March 26, 1970, West instituted this suit for a permanent injunction to enjoin the use of the reservoir for gas storage purposes until all the native gas had been produced. Alternatively, West asked for a declaratory judgment decreeing "that if Defendant uses said reservoir as a gas storage reservoir, Defendant must account to Plaintiff's for their royalty interest in all gas produced from said reservoir irrespective of whether said gas be native gas or stored gas."

Exxon commenced injection of extraneous gas on September 1, 1970, thereby willfully breaching its legal obligation to West by ceasing normal and regular production from the field and injecting therein gas produced in other places, for the purpose of storage. Exxon thereby intentionally co-mingled West's gas with the extraneous gas.

Exxon took the position that it should pay West for the property it had taken, but the price was to be calculated by Exxon and not paid in cash. Rather, the Court found that no compensation need be paid to West for the property taken, i.e. the gas remaining which is deemed "unrecoverable" under the present technology and the storage reservoir which holds such gas.

In its Answer to West's suit, Exxon did not request the Court's consent to permit the breach of its contract or the confiscation of West's property. Instead, Exxon proceeded to do what the suit was filed to prevent and thereafter took the position that West's request for an injunction was moot because the undisputed evidence established at the time of the trial extraneous gas had already been injected and there was substantial co-mingling in the reservoir.

The only justification Exxon offered for taking West's property while ignoring the jurisdiction of the Court was that it acted to save Exxon's and the public's interest in the reservoir. Exxon did not request a hearing to determine this question nor did it make any effort to obtain the power of eminent domain.

Trial was before the Court without a jury and consisted of a stipulation together with the testimony of two (2) Exxon employees who rendered their opinion as to the size of the perimeters of the reservoir and the amount of hydrocarbons contained therein. A large part of each witness' testimony was devoted to an effort to illustrate the public's interest in the reservoir.

It was the opinion of one of the Exxon witnesses that his computations contained a margin of safety that left him *"absolutely certain* that we are paying these people at least as much or more with this project as they would have received without." S.F. I-161 (emphasis added). When asked if his computation of the recoverable gas could be increased, his reply was "in my opinion that is *not possible*." (S.F. I-174, emphasis added). West offered no expert witnesses but attempted by cross-examination to elicit an admission that other qualified experts would have different opinions as to the size of the reservoir and/or the quantity of hydrocarbons it contained. The witnesses remained steadfast in their opinion that West was being overpaid. The trial court entered a judgment denying the injunction but decreeing that Defendant must account to West for the royalty interest in all gas produced from such field, irrespective of whether said produced gas be native gas or stored gas.

All parties appealed and the Court of Civil Appeals reversed and remanded with instructions to enter the permanent injunction requested by West. The case was appealed by Exxon to the Supreme Court of Texas which reversed and remanded the cause to the trial court for a new trial, treating the matter as one of first impression where there was no directly controlling precedent. Stating the case to be one involving an "adjustment" of correlative rights, the Supreme Court, surprisingly and for the first time in the case, declared the public interest in using the reservoir as an emergency storage facility and found that injunction against injection of extraneous gas would render illusory the use of the reservoir for storage purposes. This "adjustment" in the public interest was an unconstitutional delegation of the power of eminent domain to Exxon. The Court said that Exxon's intentional confusion of the two bodies of gas should not impose on Exxon the obligation of paying royalties on all gas thereafter produced from the reservoir, but rather required Exxon to prove "with reasonable certainty" the volume of gas reserves upon which the Wests would have been entitled to royalties absent injection of extraneous gas and remanded the case to give Exxon the opportunity to discharge that burden. The absolute testimony of Exxon's expert witnesses that West was already overpaid was ignored by the Supreme Court.

At the second trial, again before the same trial judge and without a jury, Exxon produced the same two witnesses, who simply testified to a different opinion. For example, their opinion of the remaining gas in the reservoir as of the time of injection was changed from 35 billion cubic feet to 95.3 billion cubic feet, a difference of 172%. The experts sought to explain away this sub-

stantial deviation with their testimony at the first trial by claiming that they had made a new study using a different criteria to form their opinion, to-wit: the perimeter of the reservoir and remaining gas in place were fixed "within the bounds of reason" instead of "reasonably".

The trial judge however, was not persuaded that the witnesses or the opinions they expressed were credible. He found instead "the trier of the facts does not believe the opinions expressed by Defendant's expert witnesses that their calculation of the maximum volume of recoverable gas are reasonably certain. To the contrary, the trier of the facts is convinced by the testimony of the Defendant's expert witnesses . . . that the maximum volume of recoverable native gas in the . . . reservoir immediately prior to the injection by Defendant of extraneous gas cannot be established with reasonable certainty".

Exxon appealed and the Court of Civil Appeals for the First Supreme Judicial District of Texas reversed and rendered the case, primarily by reason of West's failure to produce an expert to contradict Exxon's experts. The Court thus required the trial Judge to accept opinion testimony rendered by an impeached, interested witnesses as true, even though he observed the witnesses testify and did not believe them.

ARGUMENT

Unconstitutional Exercise of Power of Eminent Domain

It is a well settled law in Texas that a tract of land may be severed into two separate estates, the surface estate and the mineral estate, both of which constitute

a real property interest and, further, that a royalty interest "carved out of" the mineral interest is also a separate estate and, as such, creates an indefeasible title to real estate in the holder. In *Sheffield v. Hogg,* 77 S.W.2d 1021 (Tex. Sup., 1934), it was held that the royalty interest of a lease providing that the lessor reserved a fractional portion of the minerals produced and requiring the lessee to deliver a fractional portion of the minerals produced to the lessor was an interest in real estate. [accord, *Gresham v. Turner,* 382 S.W.2d 791 (Tex. Civ. App.—El Paso, 1963, n.w.h.)]. The Supreme Court of Texas, in *Harris v. Curry,* 176 S.W.2d 302 (1944), has further held that the owner of land may treat his estate in several ways:

> "The owner of the entire estate in land may convey the minerals therein separately from the surface. Conversely, he may convey the surface separately from the minerals. Stated in another way: The owner has the right to sever his land into two estates, and he may dispose of the mineral estate and retain the surface, or he may dispose of the surface estate and retain the minerals . . . A severance of the mineral estate from the remainder of the land may be effected either by the conveyance of the minerals alone or by the conveyance of the land with a reservation of the minerals . . . When the mineral estate in land has been severed from the balance of the land there come into existence two separate and distinct estates, *each having the incidents and attributes of an estate in land.*" (176 S.W.2d 302, 304-305, citations omitted, emphasis ours).

See also *Watkins v. Slaughter,* 189 S.W.2d 699 (Tex. Sup., 1945) wherein the Supreme Court held that a

royalty interest, whether created by grant or reservation or by lease is an interest in land. To the same effect see *Benge v. Scharbauer,* 259 S.W.2d 166 (Tex. Sup., 1953); *Clyde v. Hamilton,* 414 S.W.2d 434 (Tex. Sup., 1967); and *Woods v. Sims,* 273 S.W.2d 617 (Tex. Sup., 1954).

Thus, the Wests, when they carved out of their original conveyance to Exxon a 1/6 royalty interest, retained unto themselves a 1/6 perpetual royalty interest which, under Texas law, is an indefeasible title to real property, an interest in land, and by the doctrine set forth in the above cited cases, such royalty interest in the minerals is dominant over the surface estate, including the reservoir or container which holds such minerals. *Acker v. Guinn,* 464 S.W.2d 348 (Tex. Sup., 1971). As such, the Wests are entitled to own such real property interest protected by all the constitutional guarantees of the Constitution of the United States, and that of Texas.

Exxon urged the Supreme Court to adopt the view that an injunction should be denied because of the overriding public interest in preserving the reservoir as a public storage facility, first as a "peaking facility" which can handle the seasonal fluctuations for the demand for natural gas and the rapidly increasing energy demands of the greater Houston area, and secondly, as a strategically located "emergency" facility, capable of providing a readily deliverable supply of gas at times when accidents, natural disasters or mechanical failures make continued delivery through normal channels impossible. Exxon further proposed to the Court that the Court should find and hold that, when Humble had paid the Wests royalty on a certain volume of gas which was determined by

Exxon, that Wests' royalty interest in the reservoir should cease, thus appropriating their 1/6 royalty interest and indefeasible title in the minerals and the reservoir.

The Supreme Court of Texas adopted such view and did so hold, that upon "proper proof" by Exxon of the amount of recoverable "native gas" in the reservoir and the payment to West of a 1/6 royalty interest on such gas, that Exxon would have no further obligation to West for the use of the reservoir or the production of gas therefrom. The Court remanded the case to the trial court to hear evidence under the burden of proof which the Court placed upon Exxon to prove such volume of gas remaining in the reservoir to a "reasonable certainty".

It should be noted that it is undisputed that under present technology, all of the gas in a reservoir and particularly this reservoir, is not recoverable, and from time to time what is economically feasible to recover depends upon the rising or falling market price for gas.

The result of this holding by the Supreme Court is, in effect, to hold that Exxon is entitled to preserve to its own use, and that of the public for the public convenience and benefit, the use of the reservoir to store extraneous gas, and that upon the production of the "recoverable native gas" in the reservoir, the real property interest of the Wests is forfeited to Exxon. Such interest includes not only Wests 1/6 perpetual royalty interest, including that gas was not recoverable under *present technology,* which under Texas law is an indefeasible title to real property, but Wests' interest and right to use the reservoir to contain such gas all becomes the property of the Exxon Corporation. Such holding by the Texas Supreme Court, in view of the fact that it is un-

disputed in this record that Exxon does not have the right of eminent domain and has never been delegated such governmental powers by the legislature of this State, constitutes an unconstitutional appropriation of West's real property. The holding of the Court is an unconstitutional *judicial* delegation of the right of eminent domain to Exxon, a private entity, and permits Exxon to acquire the real estate of West without due process of law guaranteed by the Fourteenth Amendment to the Constitution of the United States, and Article 1, §19 of the Texas Constitution.

It is elementary that Courts do not have the power under the Constitution to legislate nor to delegate legislative authority. In this case that is what the Supreme Court of Texas has accomplished by its holding because it has, without legislative or judicial authority to do so, taken the real property interest of West and invested Exxon with all rights, privileges and benefits of such real property interests without semblance of due process. Is it not obvious that if the legislature of the State of Texas had intended that Exxon could acquire Wests' property rights for the public purpose of storing gas in the public interest and for public necessity and convenience, that it would have delegated to Exxon the right of eminent domain to so acquire West's interest in these minerals and in this reservoir. The effort of the Supreme Court to supplant its judgment for that of the legislature of the State of Texas is an unconstitutional usurpation of legislative power which should not be condoned or caused by the Supreme Court. It cannot be said to be a valid exercise of police power because the Exxon Corporation has no such police power delegated to it by the State of Texas. Rather the Supreme Court of Texas has chosen

to confer upon Exxon some quasi-public function which the legislature never intended. In truth and in fact Exxon is nothing more than an entity doing business for profit and does not enjoy the right of eminent domain conferred upon some public utilities by the legislature. In any event, Exxon never followed, and the Supreme Court did not require Exxon to follow, the procedures required by the due process provisions of the Texas and United States Constitutions to acquire any interest in this reservoir for the public use and benefit.

The Texas Supreme Court in *Pope v. Ferguson,* 445 S.W.2d 950 (Tex. Sup., 1969) observed that it had no inherent power beyond that granted by the Constitution when it stated:

> "The Court has no 'inherent power', *Ex Parte Hughes,* 133 Tex. 505, 129 S.W.2d 270, 273 (1939); and not even the Supreme Court of the United States can confer upon it a power or jurisdiction beyond the limitations imposed by the source of it's existence . . ."

The entry of the Judgment by the Supreme Court in this cause is state action within the meaning of the Fourteenth Amendment and has been so held by numerous federal authorities. *Galella v. Onassis,* 353 F.Supp. 196 (D.C.N.Y., 1972); *Brotherhood of Railroad Trainmen v. Virginia Ex Rel. Virginia State Bar,* 377 U.S. 1 (1964); *Schware v. Board of Bar Examiners,* 353 U.S. 232 (1957); *Barrows v. Jackson,* 346 U.S. 249 (1953); *Shelley v. Kraemer,* 334 U.S. 1 (1948).

In *New York Times Company v. Sullivan,* 376 U.S. 254 (1964), the contention was made in a lawsuit be-

tween private parties involving the Constitutional guarantees of freedom of speech and the press, that there was no federal question because "the Fourteenth Amendment is directed against state action and not private action". The United States Supreme Court in rejecting such contention stated:

> "Although this is a civil lawsuit between private parties, the Alabama Courts have applied a state rule of law which petitioners claim to impose invalid restrictions on their Constitutional freedoms of speech and press. It matters not that the law has been applied in a civil action and that it is common only though supplemented by statute . . . *The test is not the form in which State power has been applied but, whatever the form, whether such power has in fact been exercised.*" (emphasis supplied, 376 U.S. 254, 276).

Thus, the Supreme Court of Texas had no constitutional right or authority by *judicial action* to permit or cause the acquisition of the West property interest by Exxon for the purpose of applying such interest for a public "peaking facility" or public "emergency" facility to provide a deliverable supply of gas in time of accidents, natural disasters or mechanical failures when such normal channels are impossible. In *Joiner v. City of Dallas*, 380 F.Supp. 754 (N.D. Texas, 1974) it was said:

> "The necessity for appropriating private property for public use is not a judicial question. This power resides in the Legislature, and may either be exercised by the Legislature or delegated by it to public officers. 'Where the intended use is public, the necessity and expediency of the taking may be determined by such agency and in such mode as the

> State may designate. They are legislative questions, no matter who may be charged with their decision . . .'" (citations omitted, 380 F.Supp. 754, 771)

Accord, *Rindge Co. v. County of Los Angeles*, 262 U.S. 700 (1923), *Sears v. City of Akron*, 246 U.S. 242 (1918).

In the case of *Burman, Executors v. Parker*, 348 U.S. 26 (1954), the United States Supreme Court states the right to acquire private property for the public interest is vested in the Legislature and not the judiciary. The Court in holding valid an act of Congress authorizing the District of Columbia to acquire property for public use and denying a right to injunctive relief said that, subject to specific Constitutional limitations, when the legislature has spoken, the public interest has been declared in terms well-nigh conclusive. In such cases the legislature, not the judiciary, is the main guardian of the public needs to be served by social legislation.

In this cause, there is not even the pretension of compliance with procedural due process. Not only did the Supreme Court of Texas not have the authority to delegate such power to Exxon, but the appropriate statutes of the State of Texas were not complied with. (See Article 3264, et seq., V.A.T.S., Vol. 9A, pg. 149, et seq.). In *Hall v. Wilbarger County*, 37 S.W.2d 1041 (Tex. Civ. App.—Amarillo, 1931 n.w.h.) the Court said:

> "The only right of eminent domain and condemnation proceeding to acquire same is that given by statute. The general rule is that where the cause of action and remedy for its enforcement are derived from the statute, its provisions are mandatory and

> exclusive and must be complied with or the action is not maintainable." [*Ryan v. State,* 21 S.W.2d 597 (Tex. Civ. App.—Waco, 1929, n.w.h.)]

Thus it is certain that not only did the Supreme Court of Texas not have the right to determine whether West's property interest could be appropriated by Exxon for a public "peaking" facility or an "emergency" public facility for the purpose of providing a readily deliverable supply of gas at times when accidents, natural disasters or mechanical failures make continued delivery through normal channels impossible, for the public use and benefit, but their decision denying relief in this cause constitutes an unconstitutional delegation of the right of eminent domain to Exxon and is a failure to comply with the procedural due process requirements of the Federal and State Constitutions.

Unconstitutional Treatment of Opinion Testimony

West was denied due process and fundamental error occurred when the Court required conclusive effect be given to expert opinion testimony, because it permitted a paid, interested witness to become the decisionmaker and the risk of false testimony on the part of the paid, interested witness is constitutionally intolerable.

The Texas Court of Civil Appeals gave conclusive effect to expert testimony primarily because West did not counter Exxon's expert witnesses with their own.

This holding is directly contrary to the long established rule that neither a Court [*The Conqueror,* 166 U.S. 110 (1897)] nor a jury [*Head v. Hargrave,* 105 U.S. 45 (1881)] is required to accept an expert witness' opinion

regardless of whether he is in any way contradicted or impeached. As reflected below, Exxon's experts were both contradicted and totally impeached. This long standing rule recognizes the proposition that "the expert knows best" is all too often a legal fallacy, considering that experts can be and usually are paid witnesses. Opinion testimony is "bought and sold" and there is a substantial high risk of such opinions being less than credible. Such risk is enhanced because of the difficulty in obtaining perjury convictions for "opinions". The risk is further enhanced because complex facts upon which opinion is founded create additional difficulty in criminal prosecutions for perjury.

This Court in the case of *The Conqueror,* supra, stated the prevailing rule as follows:

> "In short . . . the ultimate weight to be given to the testimony of experts is a question to be determined by the jury, and there is *no rule of law* which requires them to surrender their judgment, or to give a controlling influence to the opinions of scientific witnesses." (emphasis added, 166 U.S. 110, 133).

It would be difficult to imagine a set of facts which more clearly demonstrates the wisdom of the rule in *The Conqueror,* than the case at bar, because the record in this case, as shown below, permits of no other construction than that the expert testimony was beyond belief. The degree of distortion possible in expert testimony if the precedent set below is permitted to stand is amply demonstrated herein.

Time and time again large oil companies have sought to establish the precedent that oil and gas matters are

too complex for the understanding of the ordinary layman, thus the opinion of experts is required to determine quantities and prices. In addition to the above described dangers, the request for such a precedent is also contaminated by the fact that "opinion" testimony of value has long been a weapon by which oil companies sought to overreach a weaker opponent. This is especially significant when Courts are re-examining *established* procedures to remove unjustified advantages held by the wealthy and powerful.

It was with considerable foresight that the rule was firmly established that the weight to be given expert testimony in oil and gas valuation matters is solely vested in the trier of the fact.

Justice Cardozo, rejecting an earlier effort to establish the precedent the Court set here, gave the following effect to opinions of value of experts:

> "If they have any probative effect, it is that of expressions of opinions by men familiar with the gas business and opportunities for profit. But plainly opinions thus offered, even if entitled to some weight, have no such conclusive force that there is error of law in refusing to follow them. This is true of opinion evidence generally, whether addressed to a jury or to a Judge or to a statutory board." [*Dayton Power & Light Co. v. Public Utilities Commission of Ohio*, 292 U.S. 290, 299 (1934), citations omitted]

Exxon's failure to produce pertinent contrary precedent amply illustrates that the rule established in *Dayton Power & Light Company*, supra, controlled until this case was decided by the Texas Court of Civil Appeals.

Further, implicit in any requirement that expert testimony must be accepted is the concept that the trier of the fact was incompetent. The record belies any suggestion that the Trial Judge, sitting through two technical trials, both actively and competently questioning witnesses throughout, was unqualified, or did not understand the issues or evidence.

Any concern which Exxon had regarding the Trial Court's ability to understand the problem, the evidence, his bias, his prejudice, or his inability for *any reason* to sit in judgment in this case must have been considered by Exxon prior to the second trial. No motion was made to remove him and Exxon waived a jury. Exxon's choice to proceed to trial before Judge Cunningham was the result of a deliberate and positive decision made after experiencing one technical trial on the same matter.

Exxon seeks a precedent that assumes the trial judge to be incompetent, ignoring the fact that the record conclusively demonstrates otherwise.

When the only decision to be made in a case is whether or not to accept an expert's testimony and the trial judge is deemed unqualified to disagree with the expert, the witness becomes the decisionmaker, as well as the finder of fact.

It is now well established that "not only is a biased decisionmaker constitutionally unacceptable but our system of law has always endeavored to prevent even the probability of unfairness." *Withrow v. Larkin*, 421 U.S. 35, 47 (1975).

A process which permits the paid, interested witness to become the decisionmaker fails the test of "due process".

Especially is this so when the witness is testifying about technical facts and opinions which involve a high risk of perjury.

It is submitted that this precedent presents a constitutionally unacceptable danger of bias and partiality both in the nature of the proceedings, and the interest of the decisionmaker. The risk of false testimony and bias on the part of the paid, interested witness is also constitutionally intolerable.

This Court in *In Re Murchison,* 349 U.S. 133 (1955) sets forth its opinion on this matter as follows:

> "A fair trial in a fair tribunal is a basic requirement of due process. Fairness of course requires an absence of actual bias in the trial of cases. But our system of law has always endeavored to prevent even the probability of unfairness. To this end no man can be a judge in his own case and no man is permitted to try cases where he has an interest in the outcome. That interest cannot be defined with precision. Circumstances and relationships must be considered. *This Court has said, however, that 'every procedure which would offer a possible temptation to the average man as a judge . . . not to hold the balance nice, clear and true between the State and the accused, denies the latter due process of law.'"* (349 U.S. 133, 136, emphasis added).

West was further denied due process and fundamental error occurred when conclusive effect was given to expert opinion testimony given by interested witnesses, whose advocacy is clear from the record and which testimony was so thoroughly impeached that the trial court found the witness was "unbelievable".

In every case where any Court has relied upon expert testimony, such testimony has flowered in a soil free of impeachment, bias, interest, advocacy, previous inconsistent statements, inherent incredibility of the story explaining material inconsistencies, or other circumstances arousing suspicion. No such condition here exists.

In the first trial these expert witnesses were *certain* that their computations resulted in West being overpaid. Whitson swore his computations left him *"absolutely certain* that we are paying these people at least as much or more with this project as they would have received without it" (S.F. I-161, emphasis added). When asked if his computations of recoverable gas could be increased he replied "In my opinion that is *not possible.*" (S.F. I-174, emphasis added).

Time and time again West's counsel tried to elicit Warnack's admission that if several geologists were given the same data they could arrive at widely divergent answers about each boundary of the container. Such a possibility was denied by Warnack who claimed his data was so reliable there would be *very little* difference of opinion. This denial continued as West's counsel examined Warnack with regard to each dimension all around the perimeter of the reservoir in an attempt to determine if reasonable men could differ.

This absolute testimony by Warnack and Whitson was not contradicted by another expert at the first trial. Nevertheless, the Texas Supreme Court was not satisfied with their opinion. Perhaps one reason is that both were interested witnesses—employees of Exxon who had long been interested in the success of the project. A witness cannot be disinterested where his testimony relates to the

question of performance or non-performance of a duty which he owed by reason of the position he occupied. [*Texas and Pacific Railway Co. v. Carlin*, 189 U.S. 354, 356 (1903)].

As far back as 1898 this Court has held that the mere fact that a witness is interested in the result of the suit is deemed to be sufficient to require the credibility of his testimony to be submitted to the trier of fact for determination. [*Sonnentheil v. Moerlein Brewing Co.*, 172 U.S. 401, 408 (1898)]. This view was again upheld in *Sartor v. Arkansas Natural Gas Corp.*, 321 U.S. 620, 628 (1944). This Court elaborated on its holding in *Fuentes v. Shevin*, 407 U.S. 67 (1972), as follows:

> "Since his private gain is at stake, the danger is all too great that his confidence in his cause will be misplaced. Lawyers and judges are familiar with the phenomenon of a party mistakenly but firmly convinced that his view of the facts and law will prevail, and therefore quite willing to risk the costs of litigation. Because of the understandable, self-interested fallibility of litigants, a court does not decide a dispute until it has had an opportunity to hear both sides — and does not generally take even tentative action until it has itself examined the support for the Plaintiff's position."

Further, both witnesses were impeached by their advocacy. The first trial record is littered with unsolicited remarks by both experts praising the reliability of the data produced by them. For example, in describing one of Warnack's maps, Whitson volunteered "I might say I think the well control in this field for mapping is excellent. It's among the best I've ever seen." (S.F. I-155) The witnesses implied that while interpreting this good data,

they had given West the benefit of any doubts. (See for example S.F. I-148 where Whitson discarded some of Warnack's current data since "it was in a downward direction".) Of course Exxon should have reconciled all doubts in favor of West prior to the first trial because they were necessarily in the position of a fiduciary dealing adversely with the cestui. When Whitson's testimony was concluded, he apparently believed his attorney failed to cover the material sufficiently. Whereupon, *at the suggestion of the witness*, the testimony was resumed. Note the reference of Whitson to "my attorney" (S.F. I-214-215). The record is replete with other examples of advocacy and positive demonstrations of interest, bias and prejudice.

If these witnesses intended to be accurate and honest with the Court at the first trial, they should not have sworn they were "absolutely certain" that West was being overpaid for his royalty interest on 8.5 *billion* cubic feet (an enormous amount of gas and/or money measured by any standard) but should have candidly admitted to West's lawyer that there was a possibility of a variance of 60.3 billion cubic feet not in West's favor — a variance of a 172%. In other words, *instead of being certain that he was being overpaid, their first computation and testimony at the first trial would result in West being underpaid by 172%.*

What caused these witnesses to so radically depart from their positive sworn testimony?

It is revealing to examine the problem which confronted Exxon when the Texas Supreme Court remanded the case for a new trial, ignoring the positive first trial

testimony that West was overpaid. Only two choices were available to Exxon:

1. They could produce an *independent* expert, who was not impeached by his interest in the case, to convince the trier of the fact that the opinions of Whitson and Warnack at the first trial were reasonably certain and that the "overpayment" to which they testified was true. (Note that the Texas Supreme Court had not asked for proof that Exxon was overpaying West an additional amount, or indeed by any amount whatsoever.)
2. They could, alternatively, change the testimony and attempt to explain it.

The reason, and the only possible reason, that Exxon did not make the first choice was that obviously such corroborating testimony was unavailable. If *any* expert would have confirmed the "8.5 BCF overpayment" the Court would have heard from him because by increasing the possible size of the reservoir and the amount of gas inside, Exxon could only cast suspicion on the original testimony that they were certain West was being overpaid. Additionally, who is in a better position to obtain such independent testimony than Exxon, especially when the data is as accurate as was claimed by Exxon? Therefore, Exxon had only one choice, to change the testimony and try to explain it.

The moment these two witnesses testified to a different sized reservoir, they became impeached by their prior inconsistent statements. Their testimony no longer had the necessary element of being "uncontradicted" because

it was contradicted, incredibly, by their own sworn testimony.

These witnesses claimed to have an explanation for their prior inconsistent statements but they were nevertheless *impeached* by their prior opinion. The Texas Court of Civil Appeals accepted the explanation and required the trier of the fact to do so. But a trier of the fact cannot be required to accept any interested party's testimony, opinion or otherwise, when it is impeached.

It is charitable to simply describe these two witnesses as "impeached", because the explanation offered for the change in the evidence is so absurd, and so totally lacking in merit that it eliminates any possible conclusion other than the testimony was devoid of credibility. This is especially so when coupled with the fact that the easy way to have solved the problem was for an independent expert to testify the 8.5 BCF overpayment was true.

Exxon would have us believe that the change in the evidence occurred because they made a new study, with a new name, which they call a "maximum reserve study". But stripped of its camouflage Exxon's true claim is that the experts used a different criteria to form their opinion —the perimeter of a reservoir and the remaining gas in place were fixed, they say, "within the bounds of reason" instead of "reasonably". Incredibly, "reasonably" is somehow supposed to be different from "within the bounds of reason". Of course there is no difference. One is merely the definition of the other. Exxon would have us believe truth is a matter of semantics.

To label this testimony as "impeached" is also a misnomer because it was no accident. The decision made by

Exxon to change this testimony was a studied, deliberate solution to a problem that was otherwise unsolvable.

Further corrupting Exxon's "explanation" is the fact that one must ignore the absolute testimony at the first trial in order to accept the explanation. The experts insist at the first trial that they only testified to a conclusion that was "reasonably accurate" (S.F. II-163). This is factually not true. As heretofore shown the testimony was absolute, containing as it did a margin of safety of 8.5 BCF "to be *absolutely certain*". There is no valid differences between *"reasonably certain"* and *"reasonably accurate"*. There is an important distinction between *"reasonably certain"* and *"absolutely* certain".

It is little wonder that both witnesses evaded the inquiry of West's counsel on depositions immediately prior to the second trial when they chose not to disclose the change which was going to occur in their testimony, even though Mr. Stayton's inquiry was direct and to the point (S.F. —Depositions 41-45).

Exxon's entire case rests on this incredible testimony and to require the Court to accept the testimony is fundamental error.

The superior advantage of the trial judge for determining the credibility of a witness is graphically described in the following often quoted passage by Judge Lamm in *Creamer v. Bivert,* 113 S.W. 1118, 1120 (Mo. Sup., 1908):

> "He sees and hears much we cannot see and hear. He will know there are things of pith that cannot be preserved in, or shown by, the written page of a bill of exceptions. Truth does not always stalk

> boldly forth naked, but modest withal, in a printed abstract in a court of last resort. She oft hides in nooks and crannies visible only in the mind's eye of the Judge who tries the case. To him appears the furtive glance, the blush of conscious shame, the hesitation, the sincere or the flippant or sneering tone, the heat, the calmness, the yawn, the sign, the candor or lack of it, the scant or full realization of the solemnity of an oath, the carriage and mien. The brazen face of the liar, the glibness of the schooled witness in reciting a lesson, or the itching overeagerness of the swift witness, as well as the honest face of the truthful one, are alone seen by him. In short, one witness may give testimony that reads in print, here, as if falling from the lips of an angel of light, and yet not a soul who heard it, nisi, believed a word of it; and another witness may testify so that it reads brokenly and obscurely in print, and yet there was that about the witness that carried conviction of truth to every soul who heard him testify."

Such observation by the trial judge is essential when the witness is attempting to explain away a crucial change in the evidence. The members of the Texas Court of Civil Appeals did not have the benefit of such observation from the "cold record" as did Judge Cunningham, who watched these witnesses as they endeavored on cross examination to explain away the change in the testimony.

This Court, in *National Labor Relations Board v. Walton Mfg. Co.,* 369 U.S. 404 (1962), observed:

> "The demeanor of a witness may satisfy the tribunal, not only that the witness's testimony is not true, but that the truth is the opposite of his story; for the denial of one who has motive to deny may be uttered with such hesitation, discomfort, arrogance

or defiiance as to give assurance that he is fabricating and that, if he is, there is no alternative but to assume the truth of what he denies."
(369 U.S. 404, 408).

In the case at bar, the witness' explanation is not only demonstrated by its lack of logic to be contrived (having as it does the incredible premise that "reasonable" is different from "within the bounds of reason"), but the demeanor of the witnesses satisfied the tribunal that they were not worthy of belief.

The inquiry in this case was simply to fix the boundary of a container and the hydrocarbons therein. Twice the trial judge had the opportunity to observe these Exxon employees as they testified. Exxon made a vigorous effort at the first trial to persuade the tribunal that their computations were so reliable that West was being overpaid. Failing in their first attempt, they went back to the same judge again attempting the same proof, that West was being overpaid, but calling it something else.

In summary, the conclusion that the testimony was inherently unbelievable is compelled by reason of the following:

(1) Both witnesses were interested witnesses;

(2) Their advocacy, bias and prejudice is clear from the record;

(3) Their prior testimony in the first trial compared to testimony at the second trial;

(4) The failure on deposition to candidly reveal to West's counsel the "change" in their testimony resulting in an increase in the quantity of gas contained in the reservoir of 172%;

(5) The explanation for the change in the testimony demonstrably incredible;

(6) The trial court, who observed the demeanor of the witnesses while making the explanation, did not believe them.

To require the trial court to accept such testimony as conclusive totally abolishes the function of the trial court in favor of a party's in-house expert. The trial court was reduced in this case to the status of a disinterested observer who was not only presumed to be unable to cope with the basic facts but also presumed to be unable to recognize two witnesses unworthy of belief when he heard them.

Exxon asks the court to approve a new and dangerous precedent which has been set by the Texas Court of Civil Appeals. In substantial matters involving large sums of money, powerful entities are able to ignore the judicial process if their expert will testify to the desired result. The trial court is informally disqualified from doing anything other than sitting as a disinterested observer, even when he knows *the witness is not worthy of belief.*

Should a litigant be permitted an opportunity to in effect, hire its own "judge" in a controversy involving technical matters?

West had no fair or impartial tribunal because the function of the trier of the facts was abdicated to the paid witness of a party, a witness who was not believed by the trial court and whose testimony was inherently incredible.

It is a denial of due process constituting fundamental and reversible error to require that such evidence be accepted by the trial court and to base a judgment thereon, which should not be sanctioned or tolerated by this Honorable Court.

WHEREFORE, PREMISES CONSIDERED, Petitioners pray this Honorable Court grant Writ of Certiorari herein for a full review of the denial of due process hereby presented.

Respectfully submitted,

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Houston, Texas 77002
713-224-9139

June 27, 1977

CERTIFICATE OF SERVICE

I hereby certify that a copy of the forgoing Petitioner's Petition For A Writ Of Certiorari To The Supreme Court of the State of Texas and the Court of Civil Appeals For the First Supreme Judicial District of Texas has been served upon Respondent's Attorney of record by placing same in the United States Mail, postage prepaid, Certified, Return Receipt Requested, this 24th day of June, 1977.

WILLIAM H. WHITE

APPENDICES

APPENDIX A

Here is set forth the opinion rendered in the Court of Civil Appeals for the Tenth Supreme Judicial District of Texas, at Waco, handed down on April 27, 1973 at 2:53 p.m., which is officially reported at 496 S.W.2d 212.

REVERSED & REMANDED 26 APRIL, 1973

Trial Court
829,006

NO. 5230

IN THE
COURT OF CIVIL APPEALS
FOR THE
TENTH SUPREME JUDICIAL DISTRICT OF TEXAS
AT WACO

WESLEY WEST, ET AL., Appellants
v.
HUMBLE OIL & REFINING COMPANY, Appellee

From 164th Judicial District
Court Harris County, Texas

OPINION

Plaintiffs West, et al., in March 1970, instituted this suit as owners of royalty interests in gas produced by defendant Humble in the Clear Lake, W (Frio) Field in Harris County. Plaintiffs alleged defendant contractually obligated to account to plaintiffs for their royalty interests in the gas produced by defendant in such field; that such field is still producing gas; and that a large quantity of gas remains to be produced; that defendant applied to

and received permission from the Railroad Commission of Texas to use the field as a gas storage reservoir into which gas would be injected for storage and produced; that such commission order did not determine or purport to determine property rights, but decided merely defendant could use the field as a gas storage reservoir insofar as the Texas conservation laws were concerned.

Plaintiffs alleged defendant stated it would account to plaintiffs for their gas royalty by paying plaintiffs sums of money upon the basis of plaintiffs' royalty interests in the volume of gas remaining in the reservoir "as has been determined by defendant."

Plaintiffs alleged defendant obligated by law to produce the remaining gas in the reservoir and account to plaintiffs for their royalty; that defendant has no legal right to make unilateral determination of the amount of gas remaining in the reservoir and discharge its obligation to plaintiff on that basis; that to do so would amount to condemnation of plaintiffs' property by paying plaintiffs a sum of money unilaterally determined by defendant.

Plaintiffs further alleged defendant will commence gas storage in the reservoir in May 1970; prayed for permanent injunction prohibiting defendant from using the field as a storage reservoir until all native gas has been produced, and alternatively for declaratory judgment decreeing if defendant used the field as a gas storage reservoir that defendant must account to plaintiffs for their royalty interests in all gas produced from said reservoir irrespective of whether it be native gas or stored gas.

Defendant answered that approximately 89% of the gas had been produced from the reservoir; that there was

a pressing need for a gas storage reservoir in the area; that production of the remaining 11% of the gas would destroy the facility for use as a reservoir; that it would pay plaintiffs' royalty on production from the reservoir, "but only until" the gas produced is equal to the volume of gas in place in the reservoir as of January 1, 1969 (the 11% above referred to); that when such amounts have been paid, defendant "will under all the circumstances here involved have more than performed as a reasonably prudent operator and will more than have performed its obligations to plaintiffs." Defendant prayed plaintiffs take nothing.

The record reflects that defendant commenced using the field as a gas storage reservoir in September 1970; was so using it at time of trial; but had been paying plaintiffs 1/6 royalty on production from the reservoir.

Trial was to the court which rendered judgment on September 18, 1972:

> 1) Denying plaintiffs' prayer for a permanent injunction.
>
> 2) Decreeing defendant must account to plaintiffs for their royalty interests in "all gas produced from the tracts in which they own royalty interests * * * irrespective of whether said produced gas be native or stored gas."

Plaintiffs appeal from that portion of the judgment denying them injunction enjoining defendant from using the field as a gas storage reservoir until all native gas has been produced therefrom.

Defendant appeals from that portion of the judgment requiring they account to plaintiffs for their royalty interests in all gas produced from the tracts, irrespective of whether said produced gas be native or stored gas.

Plaintiffs are lessors and are owners of royalty interests in the gas in the Clear Lake field. Defendant is lessee, owns the corporeal estate, and has the possessory rights.

Nevertheless plaintiffs' royalty interest is an interest in real property; and such is a fee simple interest in land, or at least a right belonging or pertaining to the horizontal strata of the land in which the gas is imbedded. Sheffield v. Hogg, S.Ct., 77 S.W.2d 1021; Watkins v. Slaughter, S.Ct., 189 S.W.2d 699.

Defendant as lessee is obligated by law to operate the premises and produce and market gas found in paying quantities. Knight v. Chicago Corp., S.Ct., 188 S.W.2d 564.

Defendant is expressly contractually obligated to pay plaintiffs royalty on *all* gas produced so long as it is produced; and defendant must accurately measure the gas produced and sold so that it may accurately account to plaintiffs for their gas royalty. Mooers v. Richardson Pet. Co. S.Ct., 204 S.W.2d 606.

Defendant has wilfully breached its unambiguous contract with plaintiffs and wilfully breached the obligation imposed by law upon it, by ceasing normal and regular production from the field, and injecting it with gas produced in other places for storage. It is true defendant has and will from time to time withdraw some of the commingled gas for sale to its customers, and has paid plaintiffs' royalty on all gas produced since storage, but

it proposes to pay plaintiffs this royalty, only until plaintiffs have received a sum of money equivalent to the sum they would ultimately receive if their property interest were not violated, *as such total sum has been calculated and fixed by defendant.*

Defendant has acted wilfully and with knowledge of plaintiffs' rights and of plaintiffs' objection to defendant's action. Defendant has so acted in the face of a pending lawsuit brought to prevent such action, and defendant will continue so to act unless restrained by some court.

Defendant says that it is in the public interest to use the field as a storage reservoir; that it has acted as a reasonably prudent operator; and that plaintiffs have an adequate remedy at law to recover damages for whatever their injury might be. This is in effect to condemn plaintiffs' royalty interest. But defendant does not have the right of eminent domain. Defendant could acquire such right by becoming a public utility; and some 21 states (excluding Texas), have statutes permitting condemnation of property for gas storage purposes.

Moreover the record reflects that plaintiffs' damages may not be fixed with any accuracy. Defendant's geologist, witness Warnock, who testified as to the size and contents of the field based on available data candidly informed the court he could not state the margin of error in his testimony. Insofar as his testimony is concerned the error could be 100%, 200% or any other figure. Defendant's engineer witness Whitson's testimony was no more certain than that of Warnock. And plaintiffs' remedy at law is inadequate if damages may not be determined with some precision. Lowe, Injunctions & Other Extraordinary Proceedings (6 Texas Practice) 2d Ed. p. 159.

To relegate plaintiffs to their damages would be to require them to employ engineers, geologists, and other experts to estimate the capacity of the field, and the amount of gas within such reservoir, or accept defendant's unilateral computations and determination; go through the stress and expense of a trial, and still be faced with uncertainty and imprecision in the computation of their damages.

And by enforcing defendant's contractual and legal obligation, plaintiffs would receive their royalty payments as the result of normal, regular, and systematic withdrawal of the gas at prices existent at time of withdrawal. To require plaintiffs to take damages as in condemnation would result in imprecision; and to require plaintiffs to accept royalty on amounts of gas defendant would withdraw from the storage facility at peak usage or in time of breakdown of its main line, would make for even more imprecision.

It is not enough that there is a remedy at law; it must be plain and adequate, or as practical and efficient to the ends of justice and its prompt administration as the remedy in equity. An injured party is entitled to relief by injunction when there is not clear, full and adequate relief at law. Sumner v. Crawford, S.Ct., 41 S.W. 994; Brazos River Conservation & Reclamation Dist. v. Allen, S.Ct., 171 S.W.2d 842.

In Crawford, supra, the court said: "If as here, the applicant shows a clear right to be left in the undisturbed possession of certain property, and that such right is about to be invaded, without semblance of right by another, such invasion on principle, should be prevented in its incipiency by injunction, instead of allowing the

injury to be inflicted, and then leaving the party to his legally adequate, but in fact generally very inadequate, remedy of an action for damages."

See also: Hunt v. Merchandise Mart, CCA, NRE, 391 S.W.2d 141; Baucum, v. Texam Oil Corp., CCA, NRE, 423 S.W.2d 434; Long v. Castaneda, CCA, NRE, 475 S.W.2d 578.

Defendant's action is wrongful and intentional, and violative of contractual and real property rights; was carried out knowing plaintiffs had filed suit to prevent such action, and while such suit was pending.

Under the record we think plaintiffs' remedy at law for damages is not as practical and efficient to the ends of justice and its prompt administration, as that of injunction. Plaintiffs' point is sustained.

The case is reversed and remanded to the trial court with instructions to enter a permanent injunction restraining defendant from further injecting the field and using same as a gas storage reservoir until all native gas has been produced therefrom.

REVERSED & REMANDED

FRANK G. McDONALD
Chief Justice

APPENDIX B

Here is set forth the opinion rendered by the Supreme Court of Texas on April 25, 1974 at 3:15 p.m., which is officially reported at 508 S.W.2d 812.

IN THE SUPREME COURT OF TEXAS

From Harris County — Tenth District

NO. B-4132

HUMBLE OIL & REFINING CO,
Petitioners
v.
WESLEY WEST, et al,
Respondents.

This is a suit by West, et al, Respondents, who are royalty owners, for injunction and, in the alternative, for declaratory judgment. The action is brought against Humble Oil and Refining Company, Petitioner, the fee owner of the gas field and mineral rights, subject to the royalty interests. The problem arises from Humble's action of injecting extraneous gas into the underground reservoir, for purposes of storage, prior to production of all the recoverable native gas. The history of the matter will be recited in some detail.

The Wests, by fee simple conveyance dated December 28, 1938, deeded all lands owned by them in the West Clear Lake (Frio) gas field in Harris County, Texas, to Humble. Each conveyance recited that the Wests "except from this conveyance and retain unto themselves, their heirs, successors and assigns, those certain royalties on oil, gas and other minerals which may be produced and saved from the lands hereby conveyed." Insofar as gas is concerned, the retained royalty was described as "a royalty equal to the market value at the well of one-sixth (1/6) of the dry gas so sold or used; provided that on

such dry gas sold at the wells the royalties shall be one-sixth (1/6) of the amount realized from such sale."

The West Clear Lake Field, a water drive field, has been producing gas since 1938. In 1969, Humble concluded that the reservoir was approaching depletion and that the injection of extraneous gas was necessary to preserve the reservoir from destruction by water encroachment. In response to Humble's application, and after a hearing on September 23, 1969, at which the Wests appeared in opposition, the Railroad Commission of Texas, under date of January 20, 1970, authorized use of the reservoir for the storage of gas. There was no appeal from this order.

On March 26, 1970, the Wests instituted this suit against Humble for permanent injunction, i.e., "that upon final trial hereof defendant be enjoined from using the Clear Lake, W. (Frio) Field, Harris County, Texas, as a gas storage reservoir until all the native gas therein has been produced." In the alternative, the Wests sought a "declaratory judgment decreeing that if defendant uses said reservoir as a gas storage reservoir, defendant must account to plaintiffs for their royalty interests in all gas produced from said reservoir irrespective of whether said produced gas be native gas or stored gas."

Humble commenced the injection of extraneous gas on September 1, 1970. In response to the Wests' suit, Humble's first amended answer, filed June 2, 1972, alleged that before commencement of the gas storage project, it had produced 89% of the recoverable gas reserves in the reservoir and that production of the remaining recoverable gas would have resulted in destruction of the reservoir's gas storage capability. Further, in answer, Humble

committed itself to continue to pay royalties on production from the reservoir "until, but only until, the total volume of all gas so produced from the particular tract is equal to the volume of gas in place in the reservoir in such tract above the gas-water contact as of January 1, 1969, terminating all royalty payments as to such tract in such reservoir when such production has occurred."

Under date of September 18, 1972, and after a trial before the Court, judgment was entered denying the prayer of the Wests for permanent injunction but decreeing "[t]hat defendant must account to plaintiffs for their royalty interests in all gas produced from the tracts in which they own royalty interests in the Clear Lake W. (Frio) Field, Harris County, Texas, irrespective of whether said produced gas be native gas or stored gas."

Upon appeal by all parties, the Court of Civil Appeals reversed the judgment of the trial court and remanded the cause, with instructions "to enter a permanent injunction restraining defendant from further injecting the field and using same as a gas storage reservoir until all native gas has been produced therefrom." 496 S.W.2d 212. Writ of error was granted at the instance of Humble. We reverse and remand.

The initial and underlying problem to be solved is whether, under the contract between the parties and the existing circumstances, the Wests are entitled to enjoin Humble from injecting gas in the reservoir until all recoverable native gas has been produced. If not, we must then determine the rights of the parties under the Wests' alternative prayer that Humble account to them in royalty payments on all gas produced from the reservoir, whether native or stored.

As to the first issue, the Wests argue that prior writings of this Court establish principles which entitle them to injunctive relief. They cite *Sheffield v. Hogg,* 124 Tex. 290, 77 S.W.2d 1021 (1934), where this Court determined that in the context of property taxation, a royalty interest, whether payable in money or in kind, should be denominated an interest in land. *See* also *Brown v. Smith,* 174 S.W.2d 43 (Tex. 1943); *Watkins v. Slaughter,* 189 S.W.2d 699 (Tex. 1945). They emphasize that one in the position of Humble is required not only to produce and market gas from the tract found in paying quantities, *W. T. Waggoner Estate v. Sigler Oil Co.,* 19 S.W.2d 27 (Tex. 1929); *Knight v. Chicago Corp.,* 188 S.W.2d 564 (Tex. 1945), but also to accurately measure such production and sales in order to accurately account to the royalty owner. *French v. George,* 159 S.W.2d 566 (Tex. Civ. App.—Amarillo 1942, writ ref'd); *Brown v. Smith, supra.* Thus, the Wests contend that the proprietary and contractual rights arising from their royalty interest translate into certain absolute rights in the native gas now in the reservoir, under which they are entitled to total production of all native gas prior to utilization of the reservoir for storage of extraneous gas. Otherwise stated, it is their position that the nature of their royalty interest, coupled with their right to royalties on all native gas produced at market demand and sold at prevailing market prices, precludes any right in Humble to commingle gas in the reservoir, and that Humble's actions so impaired the rights of the Wests as to entitle them to enjoin further commingling. Additionally, they argue by analogy the applicability of the principle of awarding injunctive relief when one intentionally appropriates another's property interest by encroachment, *Bickler v. Bickler,* 403 S.W.2d

354 (Tex. 1966), or when one is acting in violation of building restrictions. *Welton v. 40 East Oak Street Building Corp.,* 70 F.2d 377 (7th Cir. 1934) cert. denied 293 U.S. 590 (1934).

The nature of the respective property interests of the parties should first be noted. As stated, the Wests conveyed fee title to the lands but reserved "royalties on oil, gas and other minerals which may be produced and saved from the lands hereby conveyed," payable in money. Humble, on the other hand, owns the lands in fee simple, and this includes not only the surface and mineral estates, but also the matrix of the underlying earth, i.e., the reservoir storage space, subject only to the reserved right of the Wests to the payment of royalties on minerals that are produced and saved. *See Emeny v. U. S.,* 188 Ct. Cl. 1024, 412 F.2d 1319 (1969), where it was said that the surface of the leased lands remaining as the property of the respective landowners included the geological structures beneath the surface, together with any such structure that might be suitable for the underground storage of extraneous gas produced elsewhere. Indeed, the Wests do not challenge Humble's ownership of the reservoir and its right to utilize it for storage; instead, they direct their argument to the time at which, they say, the storage right accrues. They argue, in essence, that the exercise of such right by Humble is postponed by the royalty reservation until total depletion of all recoverable native gas from the reservoir.

It is manifest that the interests of the parties have come into conflict and are not fully compatible. Thus, we have again the recurring problem of adjusting correlative rights.

The factual context is unique and there is no directly controlling precedent; however, this Court has led the way in conciliating conflicts between owners of the surface and of the mineral rights, and in requiring reasonable accommodation between them. *See Robinson v. Robbins Petroleum Corp.*, 501 S.W.2d 865 (Tex. 1973); *Sun Oil Co. v. Whitaker*, 483 S.W.2d 808 (Tex. 1972); *Acker v. Guinn*, 464 S.W.2d 348 (Tex. 1971); *Getty Oil Co. v. Jones*, 470 S.W.2d 618 (Tex. 1971); *Humble Oil & Refining Co. v. Williams*, 420 S.W.2d 133 (Tex. 1967); *Railroad Commission v. Manziel*, 361 S.W.2d 560 (Tex. 1962); *Brown v. Lundell*, 344 S.W.2d 863 (Tex. 1961); *Warren Petroleum Corp. v. Mazingo*, 304 S.W.2d 362 (Tex. 1957); *Warren Petroleum Corp. v. Martin*, 271 S.W.2d 410 (Tex. 1954). These writings and the principles which they establish are instructive here.

In *Acker v. Guinn, supra*, we affirmed that it is not ordinarily contemplated in mineral leases or deeds that the utility of the surface will be destroyed or substantially impaired by the uses made of the surface for the production of minerals.

In *Getty Oil Co. v. Jones, supra*, a dispute arose between the surface owner and the oil and gas lessee over rights to exclusive use of air space above the surface area occupied by oil pumping units required for production of the minerals. This Court was faced with seemingly irreconcilable positions; the surface owner was unable to operate his automatic irrigation sprinkler system, and hence unable to fully utilize his surface rights because of obstacles in the form of the lessee's existing pumping units. In addressing the conflict between the parties, we recognized the well settled principle that the oil and gas

estate is dominant over the surface estate; further, that the lessee has a right to use as much of the premises as necessary to produce and remove the minerals. However, we also reiterated that while the rights accruing from the dominant estate are well established, they are not absolute. The lessee is required to exercise his rights with due regard for the rights of the surface owner; and we held that the lessee was subject to the rules of reasonable usage with respect to an existing use of the surface. Thus, the factual context, coupled with the public policy of developing resources and promoting productive agricultural use, required an accommodation between the rights of the dominant and servient estates.

A further example of the balancing of competing interests in the oil and gas context is found in *Railroad Commission v. Manziel, supra*. Here, this Court was faced with a question of whether an enjoinable "tresspass" occurred when an adjoining mineral estate was invaded by salt water injected pursuant to secondary recovery projects authorized by the Railroad Commission. While the issue arose in the context of the validity of the Railroad Commission order, we emphasized that application of orthodox rules and principles may not be appropriate under such circumstances; we spoke of balancing the interests of society and the interests of the oil and gas industry as a whole against the interest of the individual operator.

In *Woodson Oil Co. v. Pruett*, 298 S.W.2d 856 (Tex. Civ. App.—San Antonio 1957, writ ref'd n.r.e.), a lease was lost as the result of non-production. The lease specifically provided that Woodson had the right to remove all property and fixtures, including the casing, and Wood-

son sought an injunction to enforce this contractual right against a producing well. While fully recognizing Woodson's explicit rights under the lease, the court determined that the destruction of the well and the waste of natural resources which would result from such removal were sufficient reason to deny the equitable relief.

In the case at hand, the interests of the parties are evident; the Wests possess a royalty interest in native gas produced from the West Clear Lake Field, while Humble owns fee title to the lands, including the subsurface reservoir. In conciliating the interests asserted by each party, we must necessarily consider the unusual nature of the subsurface reservoir and the West Clear Lake gas fields. The unique geologic and geographic characteristics of the reservoir are shown by the record; further, the evidence establishes that since this reservoir lies in a water drive field, salt water encroachment reduces the storage capability as native gas is produced. Absent injection of extraneous gas, production of native gas to depletion will result in a "watering out" or total destruction of the storage capability of the reservoir. As a consequence, injunction against the injection of extraneous gas would render illusory Humble's ownership of the storage rights in the reservoir.

Moreover, our ruling will determine the continued existence of an important natural resource. The record reveals two significant features of the reservoir which vitally affect the public interest. First, the reservoir is well-suited as a "peaking" facility which can handle the seasonal fluctuations and rapidly increasing energy demands for the greater Houston area; secondly, it is a strategically located "emergency" facility, capable of pro-

viding a readily deliverable supply of gas at times when accidents, natural disasters or mechanical failures make continued delivery through normal channels impossible.

Under these circumstances, the accepted principles of accommodation that have ruled the resolution of like conflicts are determinative, and we hold that the Court of Civil Appeals erred in ordering the injunctive relief sought by the Wests.

The denial of injunctive relief requires a determination of whether the contractual obligation of Humble is to account in royalties on the production of all gas from the reservoir, "irrespective of whether said produced gas be native or stored gas," as decreed by the trial court.

The Wests argue that this "pay forever" judgment is compelled by the language of the original conveyance. The conveyance stated that the Wests "except from this conveyance and retain unto themselves, their heirs, successors and assigns, those certain royalties on oil, gas and other minerals which may be produced and saved from the lands hereby conveyed." Thus, the Wests claim that while Humble may be permitted to inject extraneous gas for storage purposes, *all* gas produced and saved from the lands is subject to the Wests' royalty interest. The original conveyance made no distinction between native gas and extraneous or stored gas, and the Wests contend that to hold that Humble is not under obligation to pay royalties on the stored gas "produced and saved" would require a rewriting of the existing instruments of conveyance.

To date, the only Texas case dealing with the issue of ownership of gas stored in a natural reservoir is *Lone*

Star Gas Co. v. Murchison, 353 S.W.2d 870 (Tex. Civ. App.—Dallas 1962, writ ref'd n.r.e.). Lone Star Gas, by various conveyances, acquired wells and leases in the Bacon Lime Field; Lone Star Gas also executed a unit operating agreement by which it acquired the right to inject and store extraneous gas in the Bacon storage reservoir. The Murchison group possessed rights as oil and gas lessees on the Jackson tract, and the southwestern part of the Bacon storage reservoir extended under the Jackson tract. The Murchisons drilled a well into the Bacon storage reservoir and took large quantities of gas therefrom. The question was whether the title and ownership of extraneous gas which Lone State injected into the reservoir for storage was lost upon production of the commingled gas. The Murchisons urged the court to adopt the reasoning of *Hammonds v. Central Kentucky Natural Gas Company*, 255 Ky. 685, 75 S.W.2d 204 (1934); when faced with a similar fact situation, the Kentucky court determined that the doctrine of animals ferae naturae was applicable. Thus, once extraneous gas which was "turned loose" in the earth wandered to another's land, the party injecting the stored gas ceased to be the exclusive owner of gas; the gas became a mineral ferae naturae.

The Court of Civil Appeals in *Murchison* rejected the doctrine established in *Hammonds* and embraced the language of *White v. New York State Natural Gas Corp., et al*, 190 F.Supp. 342 (W.D. Pa. 1960), where it was stated that "once severed from the realty, gas and oil, like other minerals, become personal property . . . title to natural gas once having been reduced to possession is not lost by the injection of such gas into a natural reservoir for storage purposes." Therefore, under *Murchi-*

son, the extraneous gas injected for storage by Humble having assumed the character of personal property, remained its property. *See* also *Chaffin v. Hall*, 210 S.W.2d 191 (Tex. Civ. App.—Eastland 1948, writ ref'd n.r.e.); *Stephens v. Stephens*, 292 S.W. 290 (Tex. Civ. App.—Amarillo 1927, writ dism'd).

The Wests assert, however, that since they possess a perpetual royalty on the gas produced from the field, their royalty interest "expires with the end of time." Thus, they argue that the contractual relationship of the parties, i.e., the obligation to pay royalty on all gas produced and saved, becomes the controlling distinction between the instant case and *Murchison*. In our view, this is not a tenable distinction but one which if adopted would implicitly recognize the doctrine of minerals ferae naturae which was rejected in *Murchison*. In accord with *Murchison*, Humble's ownership of the gas as personal property is not altered either upon injection of the gas into the reservoir or upon later production of the gas. The language of the conveyance does no more than reserve the royalty interest in the native gas in the reservoir, and Humble's ownership of the extraneous gas is unaffected thereby.

An alternative basis to be considered is whether the trial court judgment may be sustained on a confusion of goods theory. Under *Murchison*, as noted, the extraneous gas is the personal property of Humble. However, by injecting this extraneous gas into the reservoir prior to production of all native gas, Humble has commingled extraneous gas, in which Humble has an exclusive property interest, and native gas, in which the Wests have a royalty interest. The question thus becomes one of determining

whether Humble's intentional "confusion" of the two bodies of gas should result in the forfeiture of its exclusive rights to the extraneous gas. If such a forfeiture is proper, the Wests would be entitled to a royalty on all gas produced, consistent with the trial court judgment.

As a general rule, the confusion of goods theory attaches only when the commingled goods of different parties are so confused that the property of each cannot be distinguished. Where the mixture is homogeneous, the goods being similar in nature and value, and if the portion of each may be properly shown, each party may claim his aliquot share of the mass. *Belcher v. Cassidy Bros. Livestock Commission Co.,* 62 S.W. 924 (Tex. Civ. App.—1901, writ ref'd); *Farrow v. Farrow,* 238 S.W.2d 255 (Tex. Civ. App.—Austin 1951, no writ); 1 Am. Jur. 2d *Accession and Confusion,* §21 (1962); 15A C.J.S. *Confusion of Goods,* §7 (1967). Additionally, the burden is on the one commingling the goods to properly identify the aliquot share of each owner; thus, if goods are so confused as to render the mixture incapable of proper division according to the preexisting rights of the parties, the loss must fall on the one who occasioned the mixture. 15A C.J.S. *Confusion of Goods,* §7, 12 (1967); 1 Am. Jur. 2d *Accession and Confusion,* §18, 24 (1962). Stated differently, since Humble is responsible for, and is possessed with peculiar knowledge of the gas injection, it is under the burden of establishing the aliquot shares with reasonable certainty. *See Eaton v. Husted,* 172 S.W.2d 493 (Tex. 1943); *Cf. Mooers v. Richardson Petroleum Co.,* 204 S.W.2d 606 (Tex. 1947); *Ortiz Oil Co. v. Luttes,* 141 S.W.2d 1050 (Tex. Civ. App.—1940, writ dism'd); 1 W. Summers, THE LAW OF OIL AND GAS §27 (1954).

Humble sought to discharge this burden by offering expert opinion evidence in estimation of the volume of native gas as of January 1, 1969; its commitment in the trial court was to continue the payment of royalties to the Wests on the basis of this proof until production of the commingled gas equaled the volume of the gas in place at such time. As to this, the Wests contend that the obligation of Humble to account for their royalty interests may not rest upon expert opinion evidence and that, at the least, upon its election to utilize the reservoir for storage and hence to commingle native and extraneous gas, Humble came under the obligation of paying royalties on all gas thereafter produced from the reservoir.

The counter position of Humble is that the opinion testimony of the geology and engineering witnesses is reasonably certain; that their testimony was based upon more than acceptable well control for mapping the reservoir, and that there existed sufficient data upon which to compute reservoir pressure, reservoir temperature, gas formation volume factor, reservoir porosity and permeability and connate water saturation. Thus, Humble asserts that the Wests' aliquot share of the gas in the reservoir prior to injection of the extraneous gas is subject to a reasonable estimate and that the expert testimony sufficiently established the volume of the reserves.

In the context of their asserted right to equitable relief, the Wests emphasize, on the other hand, that Warnack, Humble's geologist witness, admitted that a certain "judgment or opinion decision" had to be made in calculating the reservoir size. They stress that the witness acknowledged that wide discrepancies may exist in determining the size of a reservoir and insist that his calculations

were based upon limited and unacceptable information. Also, they note that Whitson, the petroleum engineer called to testify by Humble, made critical calculations of porosity and permeability by means of mathematical averages; further, that experts agree that the limits of a reservoir are difficult of exact determination.

As we have indicated, it is our view that the act of commingling native and extraneous gas did not impose upon Humble the obligation of paying royalties on all gas thereafter produced from the reservoir, if the evidence establishes with reasonable certainty the volume of gas reserves upon which the Wests would have been entitled to royalties, absent injection of extraneous gas. The burden of this showing devolves upon Humble after proof by the Wests of their royalty interests, together with proof of Humble's commingling of extraneous and native gas. The threshold question for determination is whether the requisite computation of reserves is capable of establishment with reasonable certainty; and, if so, the further question to be resolved is whether the burden defined above is discharged by Humble under the evidence. We have concluded that the cause should be generally remanded to the trial court for determination of these issues at the trial level, as well as for consideration of any other issues the parties may raise in the light of our rulings.

The judgment of the Court of Civil Appeals is reversed and the cause remanded to the trial court for further proceedings in accordance with this opinion.

Zollie Steakley
Justice

OPINION DELIVERED: April 24, 1974

APPENDIX C

Here is set forth the opinion rendered by the Court of Civil Appeals for the First Supreme Judicial District of Texas, sitting at Houston, on October 7, 1976, and which is officially reported at 543 S.W.2d 667.

Reversed and rendered, and opinion filed October 7, 1976.
FGE/b

NO. 16,723

EXXON CORPORATION, Appellant,
vs.
WESLEY WEST ET AL, Appellees.

Appeal from District Court of Harris County

Exxon Corporation, the successor in interest to Humble Oil & Refining Company, appeals from a judgment decreeing the rights of certain royalty owners, the Wests, to gas produced from an underground reservoir being used by Exxon for the purpose of storing extraneous gas. The trial court's judgment will be reversed and rendered.

The use of the West Clear Lake (Frio) reservoir for gas storage purposes was authorized by order of the Texas Railroad Commission, entered over the Wests' protest on January 20, 1970. The Wests did not appeal that order but on March 26, 1970, filed this action seeking to permanently enjoin Humble from using the reservoir for gas storage purposes until all native gas had been produced and, in the alternative, seeking a declaratory judgment that Humble should be required to pay royalty on all gas produced from the reservoir regardless of whether it should be native gas or injected gas. On September 1, 1970, Humble commenced, and has thereafter continued, the injection of extraneous gas into the reservoir.

On a previous trial of this case, the trial court denied injunctive relief, but granted the declaratory judgment requested by the Wests. On appeal, the trial court's judgment was reversed and remanded by the Court of Civil Appeals with instructions to enter the permanent injunction. 496 S.W.2d 212. However, the Supreme Court reversed the intermediate court's judgment, holding that the injunctive relief was not warranted, and that the cause should be remanded for the purpose of determining the amount of royalty which Humble should be required to pay to the Wests. Humble Oil & Refining Company v. West, 508 S.W.2d 812, 819 (1974). In its opinion, the Supreme Court stated the rule which would be applicable to the further trial of the case:

> ". . . [I]t is our view that the act of commingling native and extraneous gas did not impose upon Humble the obligation of paying royalties on all gas thereafter produced from the reservoir, if the evidence establishes with reasonable certainty the volume of gas reservoirs upon which the Wests would have been entitled to royalties, absent injection of extraneous gas. The burden of this showing devolves upon Humble after proof by the Wests of their royalty interest, together with proof of Humble's commingling of extraneous and native gas. The threshold question for determination is whether the requisite computation of reserves is capable of establishment with reasonable certainty; and, if so, the further question to be resolved is whether the burden defined above is discharged by Humble under the evidence. . ."

At the second trial of this case, from which this appeal is taken, Exxon presented two witnesses, a geologist and a petroleum engineer, both of whom were within its

employ, who gave their expert opinions that the maximum (total) amount of gas which could have been in place in the reservoir as of September 1, 1970, the date storage operations were commenced, would have been 95.3 BCF (billion cubic feet). Theirs was the only testimony presented at the trial. At the conclusion of their testimony, both sides rested, and the trial court entered its judgment in favor of the Wests, declaring that Exxon is required to account to the Wests for royalty on all gas which is produced from the field, regardless of whether the gas is native or stored. In support of its judgment the trial court found, among other things, that Exxon had not established with reasonable certainty the maximum volume of either the "recoverable" gas or of the "total" gas which could have remained in the reservoir when gas storage operations were first commenced. In its findings the trial court specifically declared that it did not believe the witnesses' opinions that their calculations were reasonably certain as to the "maximum" volume of "recoverable" gas and it found that such determination could not be made with reasonable certainty. For reasons not clear, it made no specific finding to this effect with respect to the witnesses' opinions concerning the maximum "total" amount of gas remaining in the reservoir. The trial court concluded, as a matter of law, that upon its findings that Exxon had not established with reasonable certainty the volume of gas reserves upon which the Wests would have been entitled to royalties, absent injection of extraneous gas, the Wests were entitled to be paid royalties on all gas produced from the reservoir, whether native or extraneous.

This court is first presented with the problem of determining the nature of the burden imposed upon Exxon under the Supreme Court's ruling. The Wests contend

that the Supreme Court's decision required Exxon to establish with reasonable certainty the particular volume of recoverable gas upon which the Wests would legally have been entitled to receive royalties in the absence of injection of extraneous gas into the reservoir. Exxon contends that even if it failed to establish with reasonable certainty the amount of recoverable gas in the reservoir, it met its burden by establishing with reasonable certainty the maximum total amount of gas which could have been in the reservoir at the time storage operations were commenced. It is Exxon's position that even though the Wests were only entitled to royalties on recoverable gas produced from the reservoir, by virtue of Exxon's stipulation in the case it was agreed that the Wests would receive payment on the basis of the maximum, or total amount of gas in place at the time storage operations were commenced. Thus, Exxon argues that its burden should be examined on the basis of its stipulated willingness to grant a "windfall" to the Wests, as opposed to the alternative of having to pay royalties to the Wests on gas produced from the field "forever."

In view of Exxon's stipulation, this court holds that its burden was met if by a preponderance of the evidence it established with reasonable certainty the maximum total amount of gas which could have been in place in the reservoir when storage operations were commenced. The question is whether the evidence compels a finding that Exxon met this burden.

The only testimony presented was that of Worthy R. Warnack, a geologist, and Robert E. Whitson, a petroleum engineer, both of whom were employed by Exxon and who were qualified as expert witnesses on the

issues in question. Both witnesses had also testified at the first trial and in that connection they had prepared the Exxon Reserve Study, representing their expert opinion of the actual total amount of gas in place and the actual amount of recoverable gas in the reservoir at the time gas storage operations were commenced. At the second trial, these witnesses again presented the Exxon Reserve Study and in addition, they presented the Exxon Maximum Reserve Study, representing their expert opinion of the maximum amount of gas which could have been in place in the reservoir at the time gas storage operations were commenced. According to the witnesses' testimony, the maximum reserve study was made for the purpose of providing a "margin of error" safety factor by extending every parameter (from which, collectively, the approximate amount of reserves was determined) to the "bounds of reason."

The bases for the Exxon Reserve Studies were electric well logs, core samples, well test information, and similar data obtained from some 32 wells drilled over the 1500 acre area of the West Clear Lake Field. Although the Wests contend that Exxon had data covering only a small percentage of the reservoir, the geologist Warnack testified that he had more information available to him than a geologist usually has in making reserve estimates in a gas field. He testified that he had the logs for about 35 wells, some inside the field and some outside, and that the density of wells was greater than would generally be found in Gulf Coast area test fields. By using this information, he was able to determine the maximum remaining acre feet of gas sand in the field.

It was principally Warnack's testimony which established the size, the productive extent, of the reservoir.

It was necessary to make a determination of the amount of gas originally in place so that by subtracting therefrom the amount of gas which had been produced, the volume of gas remaining in the reservoir could be computed. Warnack testified that the reservoir originally contained 155,502 acre feet of productive gas sands, a productive areal extent of approximately 1500 acres. He testified that as of January 1, 1969, there were about 21,744 acre feet of gas sand remaining in the reservoir.

In order to determine the size of the reservoir, it was necessary to fix the location of its ceiling, which was the point of contact of the gas bearing Frio sand formation with the impermeable shale formation, and to determine the point of contact between the sand formation and the salt water bearing sand which formed the floor of the gas reservoir. It was also necessary to determine the areal location of a fault which sealed the gas within the reservoir and constituted its eastern boundary. Using the well logs and other data available to him, Warnack stated his opinion that 21,744 acre feet of productive gas sand remained in the reservoir on January 1, 1969. The petroleum engineer, Whitson, using Warnack's geological interpretations, computed the remaining gas in place in the reservoir on September 1, 1970, to be 35 BCF.

At the first trial, in response to the trial court's question, Warnack testified that he could not state the "margin of error" in the Exxon Reserve Study. Accordingly, in preparing for the second trial, Warnack and Whitson prepared the Exxon Maximum Reserve Study to determine just how large the reservoir could be and just how much remaining gas the reservoir could contain "within the bounds of reason." In making his geological interpreta-

tion for the Maximum Reserve Study, Warnack picked the highest point on the log for the ceiling of the reservoir, the deepest point for the gas/water contact and the most eastern areal location for the fault; all of these points being extended, in the witnesses' opinion, to the "bounds of reason." Thus, the Maximum Reserve Study was intended to depict the outermost parameters of the gas reservoir as might be determined by any reasonable geologist or engineer interpreting the data available. In furtherance of this purpose, Warnack testified that the well logs were re-evaluated in order to provide as high a net effective pay interval in each well as was reasonably possible and the top of the reservoir was also enlarged by flattening the contours of the crest. Whitson testified that in making the Maximum Reserve Study, their approach was to determine the maximum gas reserves which reasonably could be possible in the reservoir, by the process of extending to the bounds of reason each of the individual parameters that entered into their reserve calculations. Under the Maximum Reserve Study, the estimated amount of the productive gas sand remaining in the reservoir on January 1, 1969, was increased from 21.7 thousand acre feet to 51.7 thousand acre feet and the maximum total remaining gas in place on September 1, 1970, was increased from 35 BCF to 95.3 BCF. On the basis of the Maximum Reserve Study, Whitson testified that in his opinion it was reasonably certain that the gas in place in the reservoir at the time of injection of extraneous gas could not have exceeded 95.3 BCF.

The Wests did not offer any testimony to controvert the testimony of Exxon's expert witnesses. They did offer in evidence the statement of facts and exhibits from the

first trial "for whatever benefit they may have as admissions and declarations against interest." They argue that the testimony of Exxon's own witnesses "completely demolished" its claim that its reserve study was reasonably accurate and that both studies were the product of witnesses' opinions which the trial court was at liberty to disregard.

In their attack on Warnack's testimony the Wests point to the fact that remapping, which resulted from four new wells being drilled between the date of the Railroad Commission hearing and the second trial, resulted in about a 2% increase in the number of net acre feet. The Wests argue that it is obvious that if additional wells should be drilled, the size of the reservoir might be further increased. Although Warnack admitted he didn't know whether drilling of more wells would result in more changes, he testified that in his opinion the net effect of any such changes would be very minor. He stated that the small change caused by the four new wells indicated very close control over the reserve calculations due to the well density in the field and high quality of data available.

The Wests complain of Warnack's testimony as to the areal location of the fault on the east side of the reservoir, contending that his movement of the fault some 300 feet to the east of its location as shown on the Reserve Study, demonstrates the inaccuracy of its location. Warnack testified that they had been able to locate the fault in about 22 wells over the field and that by entering the subsea elevation of that fault by the wells' symbol, they had contoured the fault plain. He admitted that the determination of where a well cuts a fault involves some judgment and opinion upon which geologists

sometimes differ, but that there was good fault control so that in his opinion they were able to draw a very accurate presentation of the fault plain. After explaining in detail how he found and located the fault in the Reserve Study and how and why he changed it in the Maximum Reserve Study, he testified that, in his opinion, the location as shown in the Reserve Study was correct; that the Maximum Reserve Study merely indicated the farthermost point to which the fault location could be extended within the bounds of reason.

The Wests also level criticism at Warnack's testimony with respect to the location of the gas/water contact constituting the floor of the reservoir. The Wests point to Warnack's testimony at the first trial, indicating that he could not explain why some of the wells tested had salt water levels higher than the level which he picked as the gas/water contact for the reservoir. At the second trial, Warnack used a system of formation "levels" to explain how certain impermeable shale barriers might cause a particular well to have a gas/water contact which would not be consistent with other wells. There is no inconsistency in Warnack's explanation and the testimony given by him at the prior trial.

In making his computation of remaining gas in place, the engineer Whitson applied porosity, permeability, and formation volume factors to the predetermined net acre feet of gas sand in the reservoir. The Wests complain of Whitson's estimates of the porosity and permeability factors, contending that his estimates were obtained by striking purely mathematical averages. Whitson's testimony, both at the first and second trials, established that these estimates were, in his opinion, reasonable and

in line with the porosity and permeability factors found in other Frio sandstone fields.

The Wests argue that there are many possibilities for error in the Maximum Study. They complain that in obtaining the net effective sand count in each well, Warnack counted intervals containing half sand and half shale as though they contained pure gas sand. This method of computation is in accord with the stated purpose of the Maximum Reserve Study, and the increase in the net sand count in this manner was clearly beneficial to the Wests. The Wests also argue that Whitson did not give due effect to the structural position within the reservoir of the tracts under which the Wests own royalty interests, contending that due to the aquafier connected to the reservoir, there is a very strong and efficient water drive which can cause the production of a tremendous amount of gas from tracts high on the structure. The Wests contend that by ignoring structural position, Whitson overlooked the possibility that the tracts in which the Wests held royalty might ultimately produce much more gas than would be indicated by an areal share of the net acre foot values. The Wests' contention overlooks the fact that the water drive affects only that gas which is recoverable from the reservoir, and since Exxon has stipulated that the Wests are entitled to have royalties determined on the basis of the maximum total volume of gas remaining in place in the reservoir, the water drive phenomenon would not be a relevant factor. Similarly, the Wests' contention that the Maximum Study is inaccurate with respect to the recovery efficiency factor used to calculate recoverable gas in place is not relevant to the ultimate inquiry before the court.

The opinion testimony of expert witnesses, even though not contradicted by an opposing expert, is generally held not to be binding upon the trier of facts if more than one possible conclusion can be drawn from the facts. Gregory v. Texas Emp. Ins. Ass'n, 530 S.W.2d 105 (Tex. 1975). This is particularly true where the experts' testimony is based upon studies made while in the employ of the party who is offering their testimony. Luttes v. State, 159 Tex. 500, 324 S.W.2d 167, 189 (1959).

However, where the nature of the subject matter of the experts' testimony is such that the trier of facts must be guided solely by the opinion of experts in that scientific field, the opinions given by the expert witnesses may be regarded as conclusive, if otherwise credible and free from contradiction and inconsistency. Scott v. Liberty Mutual Ins. Co., 204 S.W.2d 16, 18 (Tex. Civ. App.—Austin 1947, writ ref'd n.r.e.); Coxson v. Atlanta Life Ins. Co., 142 Tex. 544, 179 S.W.2d 943 (1944).

A review of the testimony of Exxon's witnesses shows that their opinion given on the first trial as to the size and extent of the reservoir remains substantially unchanged at the time of the second trial. Their testimony with respect to the Maximum Reserve Study did not reflect any change in their opinion as to the actual location of the parameters of the gas reservoir, but instead indicated their estimate as to the reservoir parameters, extended to the "bounds of reason". The expert testimony that the maximum total remaining gas in place on September 1, 1970, could not with reasonable certainty have exceeded 95.3 BCF, is uncontradicted either by direct testimony or by inferences to be drawn from the testimony presented. The only reasonable conclusion that can be

drawn from the evidence presented is that afforded by the opinions of the Exxon witnesses.

Although Warnack and Whitson were employees of Exxon, and may be considered interested witnesses, their testimony was clear, direct and positive and there was nothing to cause any reasonable suspicion as to the credibility of their testimony. Furthermore, the record reflects that expert testimony available to the Wests could have been presented in contradiction of the testimony of Exxon's witnesses. The fact that the Wests had an opportunity to offer contrary evidence and failed to do so, constitutes effective corroboration of the testimony of these witnesses. Bayou Drilling Co. of Texas v. Baillio, 312 S.W.2d 705, 709 (Tex. Civ. App.—Houston, 1958, writ ref'd n.r.e.); Cochran v. Wool Growers Central Storage Co., 140 Tex. 184, 166 S.W.2d 904 (1943); Gibbs v. Wheeler, 306 S.W.2d 929, 934 (Tex. Civ. App. —Austin, 1957, writ ref'd n.r.e.); McDonald, Texas Civil Practice, Vol. 3, Sec. 11.28.6, p. 250.

Exxon's burden under the Supreme Court's decision, and pursuant to its stipulation, was to establish by a preponderance of the evidence the maximum total volume of gas reserves in the reservoir at the time gas storage operations were commenced. It met this burden by presenting clear, positive and unimpeached testimony of experts who, upon sufficient factual bases, stated their estimate of this volume. The ultimate issue was not required to be proven with exact certainty, only with reasonable certainty. Southwest Battery Corp. v. Owen, 131 Tex. 423, 115 S.W.2d 1097 (1938).

Where, as in this case, there has been a conversion of goods through intentional commingling, and the evidence

establishes a reasonably certain estimate of the extent of property converted, judgment should be entered upon the basis of such amount, even though the precise amount cannot be ascertained with reasonable certainty. Ortiz Oil Co. v. Luttes, 141 S.W.2d 1050, 1055 (Tex. Civ. App.—Texarkana 1940, writ dism'd by agr.).

The testimony of the witnesses, although interested, was corroborated and undisputed; in the absence of contrary evidence or inconsistency raising a reasonable suspicion as to its truth, it was conclusive of the issue. Texas & P. Ry. Co. v. Moore, 329 S.W.2d 293, 299 (Tex. Civ. App.—El Paso 1959, writ ref'd n.r.e.); Kamp v. Hargis Building Co., 238 S.W.2d 277, 282 (Tex. Civ. App.—Galveston 1951, writ ref'd n.r.e.).

In Teal v. Powell Lumber Co., 262 S.W.2d 223, 239 (Tex. Civ. App.—Beaumont 1953, no writ), a boundary suit, the expert was a surveyor who testified without contradiction as to ground objects he had found and measurements he had made; based thereon he gave his opinion as to the location of the original witness-trees called for as the survey's corners. Holding that the trial court in a non-jury trial was not at liberty to disregard this testimony, the court stated:

> "Counsel for appellee also advance the theory that the evidence adduced by appellee, taken in conjunction with the physical aspects of the trees themselves, showed the witness Stonecipher to be so palpably in error about the ages of the sweet gum tree and the white oak tree, and in his opinion that they were original witness-trees called for at the northeast corners of the Allen league and the Suddeth survey, that the trial court was at liberty to disbelieve and disregard all of the witness' testimony. In essence,

their contention appears to be that the trial court was warranted in finding, and should therefore be presumed to have found, that the witness did not bona fide entertain the opinions which he expressed, but swore falsely regarding them, and was therefore unworthy of belief in any of his testimony.

"We do not think the evidence warranted any such conclusion by the trial court, and since the testimony of the witness with reference to the objects he found on the ground, the measurements he made, etc., was uncontroverted, we are of the opinion that the rule announced in the case of Texas & N.O.R.R.Co. v. Burden, 146 Tex. 109, 203 S.W.2d 522, 530, with reference to the province of the jury has equal application to the trial court in this instance; that is: 'It is the province of the jury to decide the issues which are raised by conflicting evidence, but where there is evidence upon an issue and there is no evidence to the contrary, then the jury has not the right to disregard the undisputed evidence and decide such issue in accordance with their wishes.' "

In the case at bar, the only conclusion which can reasonably be drawn from the evidence presented is that the maximum total gas remaining in the reservoir upon commencement of gas storage operations was 95.3 BCF. There is neither legal nor factual basis upon which the trial court's judgment can be sustained. Since it does not appear that the cause should be remanded for further proceedings in the interest of justice or for other reason, the judgment of this court will be one of rendition. Hodges Tire Co. v. Kemp, 334 S.W.2d 627 (Tex. Civ. App.—Fort Worth 1960, no writ).

The judgment of the trial court is reversed and judgment is rendered that the maximum total gas remaining

in the gas reservoir in question as of September 1, 1970, does not exceed 95.3 BCF and that Exxon is not required to account to the Wests for their royalty based on gas produced from the field in excess of that amount.

/s/ Frank G. Evans
Associate Justice

Judgmenr rendered and opinion filed October 7, 1976.

Supreme Court, U. S.
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IN THE

Supreme Court of the United States

OCTOBER TERM, 1976

No. 76-1860

WESLEY WEST, ET AL,
Petitioners,

v.

EXXON CORPORATION,
Respondent.

BRIEF FOR RESPONDENT IN OPPOSITION

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IN THE

Supreme Court of the United States

OCTOBER TERM, 1976

No. 76-1860

WESLEY WEST, ET AL,
Petitioners,

v.

EXXON CORPORATION,
Respondent.

BRIEF FOR RESPONDENT IN OPPOSITION

To the Honorable Supreme Court of the United States:

Now comes Respondent, Exxon Corporation, and files this its Brief in Opposition to the Petition for Writ of Certiorari of Petitioners, Wesley West, et al, and would show the Court as follows:

Opinions Below

The opinion of the Court of Civil Appeals on the first appeal is reported at 496 S.W.2d 212 (Appendix A of Petition). The opinion of the Supreme Court of Texas on the first appeal is reported at 508 S.W.2d 812 (Appendix B of Petition). The Opinion of the Court of Civil Appeals on the second appeal is reported at 543 S.W.2d 667 (Appendix C of Petition).

Jurisdiction

This Court does not have jurisdiction of this case because Petitioners did not timely or properly raise federal questions in the state court, no federal questions are involved in the case, and the state court judgment is based upon non-federal grounds. Petitioners present two questions for review by this Court:

> (1) Does the state court judgment result in the exercise of eminent domain by Respondent and the taking of Petitioners' property without due process of law contrary to the Fifth and Fourteenth Amendments of the United States Constitution?
>
> (2) Did reversal of the trial court judgment by the Court of Civil Appeals following the second trial result in denial to Petitioners of constitutional due process?

The Petition fails to show that the questions presented to this Court were timely or properly asserted as error in the state courts. In fact, those questions were not timely or properly asserted. As *respondents* before the Supreme Court of Texas in the first appeal, Petitioners argued in passing, without mention of any federal question, that Exxon sought to condemn their royalty interest. (See Petition p. 9). In their motion for rehearing filed in the Supreme Court of Texas following its decision, the only constitutional ground raised by Petitioners was an alleged destruction or impairment of their contractual relationship and there was no mention of eminent domain or condemnation. (Petition pp. 9 and 10). Under Texas practice, "The grounds relied upon for the rehearing shall be distinctly specified in the motions." Rule 515, *Texas Rules of Civil*

Procedure. On the second appeal, Petitioners did not assert in the Court of Civil Appeals or in the Supreme Court of Texas that an unlawful taking of their property has occurred.

The second question presented to this Court was not assigned as error until Petitioners filed their motion for rehearing in the Supreme Court following the refusal of that Court to grant a writ of error on their second appeal. Under Texas procedure, Petitioners were required to include assignments of error in their motion for rehearing to the Court of Civil Appeals, and gounds of error not so assigned cannot be considered by the Supreme Court on appeal. Rule 469(c), *Texas Rules of Civil Procedure,* provides as follows:

> (c) Points of Error. The points of error relied upon, separately numbered, shall be . . . germane to some assignment of error in the motion for new trial in the trial court . . . and likewise assigned as error in the motion for rehearing in the Court of Civil Appeals. . . . If the ruling complained of originated in the Court of Civil Appeals, it must also be assigned as error in the motion for rehearing in said court.

See, *e.g., Oil Field Haulers Association* v. *Railroad Commission,* 381 S.W.2d 183 (Tex.Sup. 1964) and *East Texas Freight Lines* v. *Loftis,* 148 Tex. 242, 223 S.W.2d 613 (1949), which hold that the Supreme Court cannot consider grounds of error which were not presented to the Court of Civil Appeals. The appeal in the instant case is from the Texas Court of Civil Appeals, since the Texas Supreme Court refused Petitioners' Application for Writ of Error. *Michigan - Wisconsin Pipeline Co.* v. *Calvert,* 347 U.S. 157; see also, *Largent* v. *State of Texas,* 318 U.S. 418; *Sullivan* v. *Texas,* 207 U.S. 416.

The Texas Supreme Court, by refusing to grant a writ of error, did not exercise jurisdiction over the merits of the instant case. In *Merchandise Mart, Inc.* v. *Marcus,* 515 S.W.2d 663 (1974), the Texas Supreme Court held that until that Court grants writ of error, the Court of Civil Appeals' judgment remains the operative judgment.

Petitioners' due process arguments were not presented as error until the motion for rehearing on the application for writ of error to the Texas Supreme Court on the second appeal; therefore, the constitutional arguments were not considered by the Texas Supreme Court. Raising a federal question for the first time in a motion for rehearing addressed to the State Supreme Court is insufficient unless the Court grants the motion and expressly decides the question. *Radio Station WOW* v. *Johnson,* 326 U.S. 120, 128; *Hanson* v. *Denckla,* 357 U.S. 235, 243-244; *Herndon* v. *Georgia,* 295 U.S. 441, 443. Since the arguments were not raised in the Court of Civil Appeals, they were not considered by any state court. It is, therefore, inappropriate for the Supreme Court of the United States to consider under 28 U.S.C. § 1257(c) a constitutional argument that has never been considered by the highest state court.

Even if they had raised federal questions in the Court of Civil Appeals on their second appeal, Petitioners would have been required to present their grounds of error as points of error in their application for writ of error filed in the Supreme Court in order to have those grounds considered by that Court. Rule 469, *Texas Rules of Civil Procedure.* See, *e.g., Sherman* v. *Provident American Insurance Company,* 421 S.W.2d 652 (Tex. Sup. 1967). In their application for writ of error, Petitioners totally failed to assert that reversal of the trial court judgment deprived them of constitutional due process. Having failed to include that ground in their motion for rehearing filed in the Court of

Civil Appeals or in their application for writ of error, it could not be considered by the Supreme Court of Texas on motion for rehearing. Failure to follow state appellate channels precludes Petitioners from obtaining review by this Court. See, *e.g., Herndon* v. *Georgia,* 295 U.S. 441, 443; *Beaty* v. *Richardson,* 276 U.S. 599.

As is clear from the opinion of the Supreme Court of Texas (Petition, Appendix B) and the opinion of the Court of Civil Appeals on the second appeal (Petition, Appendix C), and as will be demonstrated under the "Argument" section of this brief, the state court judgment is based upon non-federal grounds, will have no effect on others than the parties to this suit, turns solely upon an analysis of the particular facts involved, and is correct in all respects.

STATEMENT

This case, devoid of any federal question which would confer jurisdiction on this Court, involved the question of whether Respondent could inject gas for storage purposes into an underground natural gas formation which it owns in fee simple title and whether, if such injection is permissible, Petitioners who own a royalty interest in the gas in the reservoir must be paid their royalty fraction on all gas removed from the reservoir, both native and extraneous injected gas so long as any gas is removed from the reservoir. The case was decided, correctly, on non-federal grounds involving application of common-law rules relating to the ownership of interests in oil and gas, the balancing of interests in a single property or properties physically associated and common-law rules relating to the confusion or commingling of goods.

Exxon Corporation, Respondent, owns the land and minerals in the West Clear Lake (Frio) Field which is located

on the edge of the City of Houston. Petitioners, Wesley West, et al, own non-participating royalty interests in the gas in the reservoir.[1]

The West Clear Lake (Frio) Field is uniquely valuable as a gas storage reservoir both from an engineering and geological standpoint and because of its proximity to Houston to serve the peaking and emergency needs of the large and growing Houston market.

In 1969 when the reservoir was approximately 89 percent depleted, Respondent applied to the Railroad Commission of Texas, the regulatory authority, for a permit to store gas in the reservoir. At a hearing held by the Railroad Commission on September 23, 1969, Petitioners protested. However, the Railroad Commission issued an order on January 20, 1970, authorizing the use of the reservoir for storage. Petitioners failed to appeal from that order and it became final. On March 26, 1970, Petitioners filed suit in the District Court of Harris County to enjoin Humble from using the reservoir as a gas storage reservoir until all native gas had been produced, and in the alternative, Petitioners sought a declaratory judgment requiring Humble to pay their royalty fraction forever on all gas produced from the reservoir irrespective of whether such produced gas be native or stored gas.

Acting under the order of the Railroad Commission, Humble began injecting gas produced from other fields into the West Clear Lake (Frio) reservoir on September

[1] Petitioners are vague in their representations as to the ownership of the parties, but they do not challenge the following holding of the Supreme Court of Texas:

> In the case at hand, the interests of the parties are evident; the Wests possess a royalty interest in native gas produced from the West Clear Lake Field, while Humble owns fee title to the lands, including the subsurface reservoir.

1, 1970, thus preserving the remainder of the reservoir as a viable storage reservoir. Uncontradicted evidence showed that as the reservoir is depleted the area formerly occupied by gas becomes filled with salt water and that the encroaching salt water renders the reservoir unusable for gas storage purposes. Thus it was necessary to begin injection before the native gas had been fully replaced by water. At all times prior to September 1, 1970, and at all times subsequent to that date, Humble has paid Petitioners their royalty interest on all gas produced irrespective of whether such gas was native or extraneous gas.

On the first trial, the District Court denied the injunctive relief but granted the declaratory judgment requested by Petitioners. Both Respondent and Petitioners appealed to the Court of Civil Appeals and that Court reversed the trial court's judgment and remanded the cause with instructions to enter a permanent injunction restraining defendant from further injecting the field and using it as a gas storage reservoir until all native gas had been produced therefrom. *West* v. *Humble Oil & Refining Co.*, 496 S.W.2d 212 (Tex. Civ. App. 1973). The Texas Supreme Court reversed the judgment of the Court of Civil Appeals and remanded the cause to the trial court for further proceedings in accordance with its opinion. *Humble Oil & Refining Co.* v. *West*, 508 S.W.2d 812 (Tex. Sup. 1974). The Supreme Court held that the Court of Civil Appeals at Waco erred in ordering the injunctive relief and, with respect to the royalty question, stated as follows:

> . . . it is our view that the act of commingling native and extraneous gas did not impose upon Humble the obligation of paying royalties on all gas thereafter produced from the reservoir, if the evidence established with reasonable certainty the volume of gas reserves upon which the Wests would have been entitled to royalties, absent injection of extraneous gas.

The Supreme Court further held that Exxon did not and does not lose title to the injected extraneous gas under the doctrine of animals *ferae naturae* and that Exxon is not contractually bound by the terms of the original conveyance to pay Petitioners royalty "forever" on all gas produced from the reservoir.

On remand to the trial court, that court held that Respondent failed to meet its burden of proof and entered judgment requiring Respondent to pay royalties on all gas produced, including extraneous, stored gas. On appeal the Court of Civil Appeals, after a careful review of the evidence, reversed the trial court judgment and rendered judgment declaring that Respondent has no obligation to pay royalties on gas produced in excess of 95.3 billion cubic feet. The opinion of the Court of Civil Appeals (Appendix C of Petition) correctly summarizes the evidence upon which the judgment of that Court is based. The Supreme Court of Texas refused to grant a writ of error with the notation "no reversible error".

Prior to the inception of this litigation, Respondent made a Reserve Study to determine the amount of remaining gas in place in the reservoir and the portion thereof which was recoverable as of January 1, 1969, and submitted this study to the Railroad Commission in connection with its application for authority to store gas in the reservoir. Respondent purchased other outstanding royalty interests but was unable to purchase the royalty interests of Petitioners. Respondent committed itself to pay royalty to Petitioner on the basis of its Reserve Study computation of the *gas in place* on January 1, 1969, recognizing, of course, that the Petitioners could, if they chose to do so, seek a greater recovery in court.

The voluntary commitment undertaken by Respondent contained two provisions to safeguard against any loss to

the Petitioners. The first safeguard was in the difference which exists between "in place" reserves and "recoverable" reserves, a considerable portion of "in place" reserves not being recoverable. Further, relating the commitment to the reserves as they existed on January 1, 1969, assured Petitioners of double payment for all production occurring after that date and prior to September 1, 1970, the date on which injection was commenced. Respondent's computation of "in place" reserves for the reservoir was 38.6 billion cubic feet as of January 1, 1969; its computation of "recoverable" reserves as of September 1, 1970, was 30.1 billion cubic feet. Thus, the two safeguards combined provided for payment of approximately 27 percent in excess of what Respondent believed to have been the recoverable reserves as of September 1, 1970, the reserves upon which Petitioners would have been paid royalty if there had been no storage project.

While the 27 percent margin of safety did not result from a scientific margin of error study, it did provide a margin of safety which was and is believed by Respondent's geologists and engineers to provide an adequate margin of safety to insure against underpayment of royalty, this belief being based upon their Reserve Study and upon their general professional training, experience and observation of the performance of Frio gas fields.

During the first trial, however, the Court asked the following questions of Worthy Warnack, Exxon's geology witness, concerning the Exxon Reserve Study.

"THE COURT: Mr. Warnack, are you familiar with a scientific term called margin of error?

THE WITNESS: I suppose. I believe I know what you mean.

THE COURT: Is this applied in geology?

THE WITNESS: We haven't made any effort to apply this in this study.

THE COURT: Well, then, you are not able to give the Court an opinion as to what in your opinion would be the margin of error in your calculations with respect to this field, is that correct?

THE WITNESS: That's correct."

Thereafter in the trial court and on the first appeal the Petitioners based much of their arguments upon this discussion.

In preparation for the second trial of this cause, in view of the Court's question in the first trial and Petitioners' emphasis thereon, Respondent decided that it should make a "margin of error study". Respondent knew of no way to make a scientific "margin of error study" except to extend each and all of the parameters which determine the volume of gas remaining in place from their respective best and most reasonable points of interpretation to their respective maximum possible extremes. In other words, once the geologist or engineer departs from the best interpretation of the data, the next marker which is a stopping place is the point of maximum possibility under the most liberal interpretation of the data. The margin of error study so conducted (the "Maximum Reserve Study") produced a maximum number of 95.3 billion cubic feet for the total volume of gas which could have been in place in the reservoir as of September 1, 1970. Gas in place always exceeds recoverable gas. The Court of Civil Appeals' judgment on the second appeal declares that Respondent has no obligation to pay royalties on gas produced in excess of 95.3 billion cubic feet.

All of the testimony in the case was presented by Respondent's witnesses, Mr. Worthy R. Warnack, a petroleum

geologist, and Mr. Robert E. Whitson, a petroleum engineer. The testimony of these witnesses is accurately summarized in the decision of the Court of Civil Appeals (Appendix C to Petition). The Petitioners had retained an expert and he was prepared to testify at the second trial. The parties agreed to submit their respective witnesses for depositions at the offices of Petitioners' expert, Butler, Miller and Lents, consulting petroleum engineers and geologists in Houston, on September 25, 1975. After Petitioners and their expert heard the testimony of Respondent's witnesses giving the substance of the Maximum (margin of error) Reserve Study, the Petitioners announced that they had discharged their expert witness, would not submit him for deposition as agreed, and would present no expert testimony at the trial. Consequently, the testimony of Respondent's witness is uncontradicted.

ARGUMENT

(A) In their futile attempt to transform this case into one involving federal questions, Petitioners incorrectly say that the Supreme Court opinion involves the law of eminent domain rather than the law relating to confusion of goods. At pages 4 and 5 of the Petition, Petitioners make this contention as follows:

> The facts of this case fall, of necessity, into one of two categories. This is either a trespass and confusion of goods case where the penalty for a wrongful confusion falls on the confusor; or, in the alternative, it is a condemnation case. The Court herein has ruled out the first alternative and in specific language as follows:
>
> > "As we have noted, it is our view that the acts of commingling native and extraneous gas did not impose upon Humble the obligation of paying royalties on all gas thereafter produced from the reservoir, if the evidence establishes with reason-

able certainty the volume of gas reserves upon which the Wests would have been entitled to royalties, absent injection of extraneous gas." (Opinion of Supreme Court, Appendix B, page 14).

By impliedly relegating this case to the area of eminent domain, the Supreme Court has committed such fundamental error as set out specifically above, to merit the serious consideration of this Honorable Court, and the preservation of the ultimate constitutional rights of the property owner here involved. (Appendix 4 and 5).

This case does not involve the law of eminent domain or any unlawful taking of Petitioners' property but clearly is based upon non-federal grounds, *i.e.*, the protection of rights of the owners of various interests in the same property or associated properties and the common-law rules relating to the confusion or commingling of goods.

Petitioners assert that the Texas Supreme Court decision results in a taking of their property "in the public interest and for public necessity and convenience". Though the Court noted that storage of gas in the reservoir benefited the public, the case was decided, correctly, on the basis of Respondent's private right to save and to use the reservoir which it owns. The Court did not, as Petitioners suggest, hold that any property interest of Petitioners could be taken or used for the benefit of the public. The Court's decision clearly was based upon the respective ownerships of the parties. The Court correctly held that Respondent owned the reservoir, and the reference to the public interest was only to recognize the beneficial result of its decision.

The Supreme Court found it reasonable to protect Respondent's rights to preserve and use its reservoir, and to protect it from destruction and to protect the rights of Petitioners and Respondent as to the gas under commingled

goods rules of the common-law. The Supreme Court stated in its opinion that,

> An alternative basis to be considered is whether the trial court judgment may be sustained on a confusion of goods theory. Under *Murchison,* as noted, the extraneous gas is the personal property of Humble. However, by injecting this extraneous gas into the reservoir prior to production of all native gas, Humble has commingled extraneous gas, in which Humble has an exclusive property interest, and native gas, in which the Wests have a royalty interest. The question thus becomes one of determining whether Humble's intentional 'confusion' of the two bodies of gas should result in the forfeiture of its exclusive rights to the extraneous gas. If such a forfeiture is proper, the Wests would be entitled to a royalty on all gas produced, consistent with the trial court judgment.
>
> As a general rule, the confusion of goods theory attaches only when the commingled goods of different parties are so confused that the property of each cannot be distinguished. Where the mixture is homogeneous, the goods being similar in nature and value, and if the portion of each may be properly shown, each party may claim his aliquot share of the mass. *Belcher* v. *Cassidy Bros. Livestock Commission Co.,* 62 S.W. 924 (Tex.Civ.App. — 1901, writ ref'd); *Farrow* v. *Farrow,* 238 S.W.2d 255 (Tex. Civ. App. — Austin 1951, no writ); 1 Am. Jur. 2d *Accession and Confusion,* § 21 (1962); 15A C.J.S. *Confusion of Goods,* § 7 (1967). Additionally, the burden is on the one commingling the goods to properly identify the aliquot share of each owner; thus, if goods are so confused as to render the mixture incapable of proper division according to the pre-existing rights of the parties, the loss must fall on the one who occasioned the mixture. 15A C.J.S. *Confusion of Goods,* § 7, 12 (1967); 1 Am. Jur. 2d *Accession and Confusion,* § 18, 24 (1962). Stated differently, since Humble is responsible for, and is possessed with peculiar knowlege of the gas injection, it is under

the burden of establishing the aliquot shares with reasonable certainty. See *Eaton* v. *Husted,* 172 S.W.2d 493 (Tex. 1943); *Cf. Mooers* v. *Richardson Petroleum Co.,* 204 S.W.2d 606 (Tex. 1947); *Ortiz Oil Co.* v. *Luttes,* 141 S.W.2d 1050 (Tex.Civ.App.—1940, writ dism'd); 1 W. Summers, THE LAW OF OIL AND GAS § 27 (1954).

. . .

As we have indicated, it is our view that the act of commingling native and extraneous gas did not impose upon Humble the obligation of paying royalties on all gas thereafter produced from the reservoir, if the evidence establishes with reasonable certainty the volume of gas reserves upon which the Wests would have been entitled to royalties, absent injection of extraneous gas. The burden of this showing devolves upon Humble after proof by the Wests of their royalty interests, together with proof of Humble's commingling of extraneous and native gas. The threshold question for determination is whether the requisite computation of reserves is capable of establishment with reasonable certainty; and, if so, the further question to be resolved is whether the burden defined above is discharged by Humble under the evidence.

Thus, the Court did not, as Petitioners contend, "impliedly relegate this case to the area of eminent domain". This case could not involve the power of eminent domain because none of Petitioners' property was taken or damaged by Respondent.

The alleged "property taken" according to Petitioners, is "the gas remaining which is deemed 'unrecoverable' under the present technology and the storage reservoir which holds such gas". (Petition p. 13). Petitioners' contentions with regard to "unrecoverable" gas are totally new and have never been presented to any court. Further, they are without merit for several reasons. First, Petitioners own no gas in the reservoir, but are entitled only

to be paid their royalty fraction, in money, of the value of all native gas produced and saved from the reservoir. In *Stephens County* v. *Mid-Kansas Oil & Gas Co.,* 254 S.W. 290 (Tex. Sup. 1923), the Court said:

> Ownership of the gas and oil in place meant having the exclusive right to possess, use, and dispose of the gas and oil. The grantors were clearly divested of the right to either possess, use or dispose of the gas and oil in place in the lands described in the instruments here involved as soon as the instruments were executed. At the same instant, the right to possess, use and dispose of such gas and oil in place passed to the grantees in said instrument and to their assigns. Complete divestiture of title to the gas and oil could hardly be more clearly evinced than by the necessity for an express grant or reservation of even enough gas for domestic use in the grantors' dwellings. Dominion over a thing could not well be completer than it is in these persons who may, at their will, assign it to any other person, with or without consideration, for a time which may be forever. The fact that whoever owns the gas and oil under these instruments, is subject to certain obligations to the former owners, express and implied, with regard to exploration for, and production of, the gas and oil, and with regard to the payment of royalties, in no wise reinvests the former owners with title.

Since a portion of gas is always unrecoverable, then such gas obviously would not have been produced and saved had the reservoir been depleted and Petitioners would not have been entitled to receive royalties on such unproduced gas. More importantly, under the final judgment in this case, Petitioner will receive more than they are entitled to receive under the opinion of the Supreme Court. They will receive a royalty on the maximum amount of gas *in place* in the reservoir which includes the unrecoverable gas, irrespective of whether such gas is recoverable under present technology or even under future technology.

As to "the storage reservoir which holds such gas", Respondent owns the land and minerals and also the matrix of the underlying earth, *i.e.*, the reservoir storage space, subject only to the Petitioners' right to the payment of royalties on minerals that are produced and saved.[2] Since the reservoir is owned by Respondent, use of the reservoir for storage of gas could not constitute a taking of Petitioners' property.

It is obvious from reading the opinion of the Texas Supreme Court that this case was decided on non-federal grounds and that there is no basis, federal or otherwise, for disturbing the final judgment of the Court of Civil Appeals.

The Supreme Court correctly held that Respondent could use its reservoir to store gas produced from other sources so long as Petitioners are paid a royalty on the amount of recoverable native gas which existed in the reservoir at the time injection commenced. Applying the law applicable to confusion of goods, the Court held that,

> . . . it is our view that the act of commingling native and extraneous gas did not impose upon Humble the obligation of paying royalties on all gas thereafter produced from the reservoir if the evidence establishes with reasonable certainty the volume of gas reserves upon which the Wests would have been entitled to royalties, absent injection of extraneous gas.

[2] In its opinion, the Supreme Court stated: "The nature of the respective property interests of the parties should first be noted. As stated, the Wests conveyed fee title to the lands but reserved 'royalties on oil, gas and other minerals which may be produced and saved from the land hereby conveyed,' payable in money. Humble, on the other hand, owns the lands in fee simple, and this includes not only the surface and mineral estates, but also the matrix of the underlying earth, *i.e.*, the reservoir storage space, subject only to the reserved rights of the Wests to the payment of royalties on minerals that are produced and saved. See *Emeny* v. *U.S.*, 188 Ct. Cl. 1024, 412 F.2d 1319 (1969), where it was said that the surface of the leased lands remaining as the property of the respective landowners included the geological structures beneath the surface, together with any such structure that might be suitable for underground storage of extraneous gas produced elsewhere."

Under the final judgment in this case, Respondent has not exercised the power of eminent domain and has condemned nothing. Petitioners' royalties will not be restricted to royalties on the recoverable gas present at the time injection commenced. Instead, Petitioners will recover royalties on the maximum amount of *gas in place* that could have existed in the reservoir, within the bounds of reason, at the time injection commenced. Therefore, they have not been deprived of "the gas remaining which is deemed 'unrecoverable' under the present technology". Because the final judgment of the Court of Civil Appeals allows Petitioners to recover royalties on the maximum gas in place (95.3 billion cubic feet) irrespective of whether such gas is recoverable under present or future technology, Petitioners will receive a windfall. Respondent has not taken or damaged any property belonging to the Petitioners. It has simply stored gas in an underground reservoir which it owns, and will pay Petitioners royalties on the maximum amount of gas that could have existed in the reservoir when injection commenced, even though a large portion of such gas was unrecoverable and royalties would not have been paid thereon if Respondent had not used its reservoir for storage of extraneous gas.

The overriding consideration of the Texas Supreme Court was whether Respondent should be compelled to destroy this uniquely valuable underground storage by depleting the native gas before any injection thus permitting the remaining reservoir sand to be occupied by salt water. Having decided that this should not be compelled, the Court was then confronted with the question whether Respondent should be required thereby to forfeit

a share of all its injected gas to Plaintiffs by being required to pay royalty on all gas thereafter produced, the combined stream of native and injected gas. The Court decided this question by holding that under the law of commingled goods Respondent should only be required to pay royalty on the combined stream produced, a homogeneous mass, until a total volume had been produced equal to the volume of reserves upon which Petitioners would have been paid had there been no injection or commingling. A commingler is not always required to forfeit its aliquot share of the commingled mass.

(B) Under their second question presented, Petitioners argue that the Court of Civil Appeals deprived them of constitutional due process in reversing the trial court judgment and rendering judgment that Respondent had no obligation to pay royalties on gas produced in excess of 95.3 billion cubic feet. Petitioners argue, in effect, that the Texas appellate courts were powerless to reverse the trial court judgment in favor of Petitioners because the only evidence presented by Respondent was opinion testimony of expert witnesses, and such testimony cannot be conclusive. Courts have often held, however, that when the subject matter is one for experts alone and the court or jury has no experience in or knowledge of the specialized subject, the unanimous and uncontroverted opinions of experts is conclusive. *Community Life & Health Insurance Company* v. *McCall,* 497 S.W.2d 358 (Tex.Civ.App. 1973, writ ref'd. n.r.e.); *Broussard* v. *Moon,* 431 S.W.2d 534 (Tex.Sup. 1968); *Standard Life & Accident Insurance Company* v. *Roberts,* 318 S.W.2d 757 (Tex.Civ.App. 1958, writ dism'd); *John Hancock Mutual Life Insurance Co.* v. *Cooper,* 386 S.W.2d 208 (Tex.Civ.App. 1965, no writ); *Coxson* v. *Atlanta Life Ins. Co.,* 142 Tex. 544, 179 S.W.2d 943 (1944); *Bohon* v. *Travelers Insurance Company,* 509 S.W.2d 905 (Tex.Civ.App. 1974, no writ); *Scott* v. *Liberty Mutual*

Insurance Co., 204 S.W.2d 16 (Tex.Civ.App. 1947, writ ref'd, n.r.e.); *National Life & Accident Insurance Company* v. *Shern,* 389 S.W.2d 726 (Tex.Civ.App. 1965, no writ); *Teal* v. *Powell Lumber Co.,* 262 S.W.2d 223 (Tex.Civ.App. 1953, no writ). For federal cases to the same effect, see, *e.g., International Shoe Co.* v. *Federal Trade Commission,* 280 U.S. 291, 299, 74 L.Ed. 431 (1929); *Ariasi* v. *Orient Insurance Co.,* 50 F.2d 548, 551 (9th Cir. 1931); *Stafos* v. *Missouri Pacific Railroad Co.,* 367 F.2d 314 (10th Cir. 1966). The cases cited by Petitioners at Pages 24-26 of their application did not involve uncontroverted expert testimony concerning matters of which only an expert could have knowledge.

Under Petitioners' theory, Respondent would have no effective right to appeal from the trial court judgment in this case. It is clear from the above authorities, however, that in reversing and rendering the trial court judgment, the Court of Civil Appeals complied with normal state judicial procedures. Compliance with normal state judicial procedures is not a denial of due process. *Howard* v. *Kentucky,* 200 U.S. 164, (1906). Reversal of a trial court decision by an appellate state court to the prejudice of one of the parties does not violate the due process guarantee of the Fourteenth Amendment. *Tidal Oil Co.* v. *Flanagan,* 263 U.S. 444 (1924).

Rule 434, *Texas Rules of Civil Procedure,* authorizes the Texas courts of civil appeals to reverse a district court decision and render judgment. 4 TEX. JUR. 2d *Appeal and Error — Civil Cases* § 930 (1974) at 630 states the general rule as follows:

> Where every fact necessary to the determination of the rights of the parties has been presented and passed on in the trial court, and the record shows that the case has been fully developed, it has been practically the uniform practice in the civil appellate courts to render,

> on reversal, the judgment that the court below should have rendered. . . .

Rendition is especially appropriate where the appellee has intentionally failed to bring forth evidence on a crucial issue when he has had an opportunity to do so at the trial level, and where there has been more than one trial. Both situations are present in the instant case.

Though it is not clear that Respondent's witnesses were "interested witnesses" (see *e.g., Stanolind Oil & Gas Co.* v. *Simpson-Fell Oil Co.,* 85 S.W.2d 325 (Tex.Civ.App. 1935, aff'd, 136 Tex. 158, 125 S.W.2d 263 [1939]), rev'd. on other grounds, 136 Tex. 158, 146 S.W.2d 723 [1941]) their testimony is no less conclusive even if they are considered interested witnesses. Testimony of an interested witness is conclusive if it is clear, direct and positive and there are no circumstances in evidence tending to discredit or impeach such testimony. *Cochran* v. *Wool Growers Central Storage Co.,* 140 Tex. 184, 166 S.W.2d 904 (1943). This is especially true when the opposite party has the means and opportunity of disproving the testimony and fails to do so. *Great American Reserve Ins. Co.* v. *San Antonio Plumbing Supply Co.,* 391 S.W.2d 41 (Tex.Sup. 1965).

This is unquestionably a case where the Petitioners had an opportunity to contradict Respondent's witnesses and failed to do so. In addition to the extensive, direct and positive evidence presented by Respondent, it is most significant that Petitioners offered no testimony and that the evidence presented through Respondent's witnesses stands undisputed in the record. Not only did Petitioners fail to offer any expert testimony, they discharged their expert witness, Mr. P. G. Von Tungeln, after Petitioners and Mr. Von Tungeln heard the testimony of Respondent's witnesses in depositions taken on September 25, 1975. Petitioners had retained Mr. Von Tungeln to testify as an

expert witness in the case, and the depositions of Mr. Von Tungeln and Respondent's witnesses were to be taken by agreement. As shown by Respondent's Exhibits 61 and 62 (the depositions of Mr. Whitson and Mr. Warnack), Mr. Von Tungeln was present during the depositions of Respondent's witnesses. The refusal of Petitioners to tender Mr. Von Tungeln for his deposition after Mr. Von Tungeln had heard the testimony of Respondent's witnesses is documented in the agreement of counsel which is contained at the close of Mr. Whitson's deposition, as follows:

> *Mr. Morgan* (attorney for Respondent): Before we go off the record, I would like something on the record. We'd like to make a statement on the record and see if you will agree to it.
>
> 'By agreement of counsel, it was decided to take the deposition of Mr. Robert Whitson and Worthy Warnack as expected witnesses for Exxon at the trial, and a Mr. P. G. Von Tungeln as an expected witness for the plaintiff, Wesley West, et al. At the agreed time and place, the depositions of Mr. Warnack and Mr. Whitson were taken by counsel for the plaintiff, and at the conclusion, when it came time for the counsel for the defendant to take the deposition of Mr. Von Tungeln, it was announced that the plaintiffs would not use Mr. Von Tungeln as a witness, and that they have no expert witness; will not tender him for his deposition, and will not present expert testimony at the trial.'
>
> *Mr. Stayton* (attorney for Petitioners): That's correct.

Thus, in addition to the fact that its testimony was undisputed, Respondent is entitled to the inference that Petitioners' witness, had he testified, would have given testimony unfavorable to the Petitioners. The inference is com-

pelling when Petitioners discharged their witness after he had heard the deposition testimony of Respondent's witnesses. If Mr. Von Tungeln believed that the maximum gas in place could not have been calculated with reasonable certainty, he would have so testified. If he believed that the reserves could have exceeded the amount shown by Exxon's Maximum Reserve Study, he would have so testified.

In McCormick, *Law of Evidence* (1954 Ed.) at pages 533-534, it is stated that:

> When it would be natural under the circumstances for a party to call a particular witness, or take the stand himself as a witness, or voluntarily to produce documents or other objects in his possession as evidence, and he fails to do so, his adversary may use this failure as the basis for invoking an adverse inference.

In *Barrera* v. *Gannaway,* 130 Tex. 143, 105 S.W.2d 876 (1937) the defendant did not attempt to rebut the evidence presented by the plaintiff. In discussing such failure to testify, the court stated that:

> Of course, this did not supply any omissions in the testimony which it was necessary for plaintiffs in error to produce, but it did strengthen the probative force of the facts which tended to prove their charge. It has even been said that this 'of itself is clothed with a certain probative force.' *Southern Pacific Co.* v. *Ulmer,* 282 S.W. 305, 307 (Tex.Civ.App.). 105 S.W.2d at 877.

In McCormick & Ray, *Texas Law of Evidence,* § 101, the authors state that,

> Where a party fails to call witnesses who have a knowledge of the facts and whose testimony is available to him such failure creates a presumption that the testimony, if produced, would have been unfavorable to the party on the issue involved. The presumption

> may arise from a failure to use witnesses who are accessible or present at the trial, or from the failure to explain or account for the absence of a witness. Moreover, where a party does not attempt to prove a particular fact by a certain person whom he could readily call for that purpose there is a presumption that it could not be done. The presumption is strengthened where the witnesses are the agents or servants of the party.

See, also, *Texas Co.* v. *Charles Clarke Co.,* 182 S.W. 351 (Tex.Civ.App. 1915, writ dism'd); *Texas Unity Oil Co.* v. *Dolman,* 8 S.W.2d 815 (Tex.Civ.App. 1928, writ dism'd); *International Great Northern Railway* v. *McGinty,* 293 S.W. 302 (Tex.Civ.App. 1927, no writ); *First National Bank* v. *Brown,* 15 S.W.2d 563 (Tex.Comm.App. 1929); *McGuire* v. *City of Dallas,* 141 Tex. 170, 170 S.W.2d 722 (1943); *Great American Reserve Ins. Co.* v. *San Antonio Plumbing Supply, supra.*

Further, it is important to remember that this case does not involve the question whether the expert testimony established with reasonable certainty the actual or precise volume of reserves. The question is whether Respondent proved with reasonable certainty that the actual amount of reserves did not exceed the figure developed by the Maximum Reserve Study. That figure resulted from an extension of all geological and engineering interpretations to the maximum possible within the bounds of reason.

Petitioners allege that there is an inconsistency between the Exxon Reserve Study presented at the first trial and the Maximum Reserve Study presented at the second trial, arguing that the evidence in the second trial was impeached by that in the first trial. It is obvious, however, that there is no inconsistency between the two studies. Because the trial court inquired at the first trial as to whether a margin

of error study had been made, and Petitioners complained on appeal that there had been no such study, a margin of error study was made in preparation for the second trial. The only way to make such a study is to extend each parameter to its maximum within the bounds of reason.

After testifying at the second trial that it is reasonably certain that the reserves could not have exceeded the numbers developed in the Maximum Reserve Study, Robert E. Whitson, a petroleum engineer, testified as follows:

> Q. How does this relate to your testimony, if my memory serves me right, in 1972 in the former trial of this case that, in your opinion, the recoverable gas as of 9-1-70 could not have exceeded 38.6 billion cubic feet?
>
> A. I haven't changed that opinion; I still believe it.
>
> Q. What did you base and what do you base that opinion on?
>
> A. That opinion was and still is based on my judgment, on my experience working with this field for eleven years, on seeing four new wells drilled with a minimum of effect on the reserve calculation. It's based on experience in other fields.
>
> Q. But it was not and is not backed up by a scientific turning upward of parameters to their maximum proportions such as in the Maximum Reserve Study?
>
> A. No, sir, it was not a scientific margin of error study. (S.F. 328-29)

Clearly, then, Respondent's witnesses did not abandon the Exxon Reserve Study at the second trial, but they did present the Maximum Reserve Study as a basis for the payment of royalties. Since there is no inconsistency between the two reserve studies, there is not, as Petitioners repeatedly assert, any impeachment of the testimony pre-

sented at the second trial. The Court of Civil Appeals concisely, and correctly, discussed the alleged inconsistency as follows:

> A review of the testimony of Exxon's witnesses shows that their opinion given on the first trial as to the size and extent of the reservoir remains substantially unchanged at the time of the second trial. Their testimony with respect to the Maximum Reserve Study did not reflect any change in their opinion as to the actual location of the parameters of the gas reservoir, but instead indicated their estimate as to the reservoir parameters, extended to the 'bounds of reason.' The expert testimony that the maximum total remaining gas in place on September 1, 1970, could not with reasonable certainty have exceeded 95.3 bcf, is uncontradicted either by direct testimony or by inferences to be drawn from the testimony presented. The only reasonable conclusion that can be drawn from the evidence presented is that afforded by the opinions of Exxon witnesses. (Appendix C to Petition, page 3K, L.)

The Court of Civil Appeals also stated, correctly, that the testimony of Respondent's witnesses,

> was clear, direct, and positive and there was nothing to cause any reasonable suspicion as to the credibility of their testimony. . . . [Respondent] met this burden by presenting clear, positive and unimpeached testimony of experts who, upon sufficient factual bases, stated their estimates of this volume. (Appendix C to Petition, page 3L.)

The following factors which are present in this case demonstrate that the Court of Civil Appeals' judgment, based on that Court's analysis of the facts, is correct.

(1) The nature of the subject matter is so technical and complex as to be beyond the scope of lay knowledge and experience.

(2) Respondent proved its case with highly competent, qualified and experienced experts whose testimony and exhibits were based upon detailed scientific study and extensive scientific data.

(3) The subject matter is one which the Supreme Court of Texas has expressly recognized as subject to proof by experts.

(4) Respondent's expert testimony as to the *maximum* reserves, when compared with the study of actual reserves, resulted in a margin of error that not only protects Petitioners against underpayment, but assures them of a large overpayment.

(5) Petitioners offered no testimony to rebut Respondent's case, and, in fact, discharged their expert witness after he heard the testimony of Respondent's witnesses. Obviously Respondent's evidence was not rebutted for the reason that it is irrebuttable.

(6) The trial court judgment would result in a total and continuing forfeiture which would constitute an unjust and open ended enrichment to Petitioners.

The Court of Civil Appeals correctly reversed the trial court judgment and rendered judgment that Respondent's obligation for the payment of royalties to Petitioners is limited to payment on 95.3 billion cubic feet.

This Court customarily denies certiorari when review is sought of a lower court decision which turns solely upon an analysis of the particular facts involved. "We do not grant a certiorari to review evidence and discuss specific facts." *United States* v. *Johnston,* 268 U.S. 220, 227. A review of the Court of Civil Appeals' opinion (Appendix C of Petition) and the statements of facts from the second trial, including 62 geological and engineering exhibits,

shows conclusively that this case turns on an analysis of the particular facts involved.

In correctly reversing the trial court judgment based upon a review of the evidence, as it is empowered to do under Texas procedure, the Court of Civil Appeals did not in any way deprive Petitioners of constitutional due process.

CONCLUSION

For the foregoing reasons, it is respectfully submitted that the petition for a writ of certiorari should be denied.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I hereby certify that 3 copies of the foregoing Brief in Opposition has been served upon Mr. William H. White, Attorney for Petitioners, 2500 Two Shell Plaza, Houston, Texas, 77002, by placing same in the United States Mail, postage prepaid, certified mail, return receipt requested, on this the 22nd day of July, 1977.

Walter B. Morgan